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In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

MELTON E. BAKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 613 F.2d 224. The district court did not issue an opinion. The judgment of the district court (App. C, *infra*, 17a) is not reported. The opinion of the Interior Board of Land Appeals

(App. D, *infra*, 18a-45a) is reported at 23 I.B.L.A. 319. The decision of the hearing examiner (App. E, *infra*, 46a-83a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 16a) was entered on February 11, 1980. On May 5, 1980, Mr. Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including June 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the locator of multiple placer mining claims is entitled to patents for all of his claims where the total volume of the minerals far exceeds the foreseeable market.

STATUTES INVOLVED

1. Section 1 of the Act of May 10, 1872, ch. 152, 17 Stat. 91, 30 U.S.C. 22, provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far

as the same are applicable and not inconsistent with the laws of the United States.

2. Section 12 of the Act of July 9, 1870, ch. 235, 16 Stat. 217 (R.S. 2329), and Section 10 of the Act of May 10, 1872, ch. 152, 17 Stat. 94 (R.S. 2331), jointly codified at 30 U.S.C. 35, provide in pertinent part:

> Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent * * *. [N]o such location shall include more than twenty acres for each individual claimant * * *.

3. Section 12 of the Act of July 9, 1870, ch. 235, 16 Stat. 217 (R.S. 2330), 30 U.S.C. 36, provides in pertinent part:

> Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the 9th day of July 1870, shall exceed one hundred and sixty acres for any one person or association of persons * * *.

4. Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, 30 U.S.C. 611, provides in pertinent part:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite or cinders * * * shall be deemed a valuable mineral deposit within the

> meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *.

5. Section 1 of the Materials Act of 1947, ch. 406, 61 Stat. 681, as amended by Section 1 of the Act of July 23, 1955, ch. 375, 69 Stat. 367, 30 U.S.C. 601, provides in pertinent part:

> The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders and clay) * * * on public lands of the United States * * *.

STATEMENT

1. To perfect a claim under the general mining law (the Act of May 10, 1872, ch. 152, Section 1, 17 Stat. 91, 30 U.S.C. 22 *et seq.*), a claimant must establish that he has discovered a valuable mineral deposit within the limits of each claim.[1] *Cole* v.

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[1] Discovery of a valuable mineral is not, however, the only prerequisite of patentability. *Andrus* v. *Shell Oil Company*, No. 78-1815 (June 2, 1980), slip op. 1 n.1. Each such claim, in addition to meeting the substantive standards of the general mining law, must satisfy state location requirements that are not inconsistent with federal law and "must be distinctly marked on the ground so that its boundaries can be readily traced." 30 U.S.C. 28; *Kendall* v. *San Juan Silver Mining Co.*, 144 U.S. 658 (1892); *United States* v. *Zweifel*, 508 F.2d 1150, 1153 (10th Cir.), cert. denied, 423 U.S. 829 (1975). Annual "assessment" work to a prescribed minimum must follow. 30 U.S.C. 28, 29. Thereafter, a locator whose

Ralph, 252 U.S. 286, 295 (1920). Since 1894, the Secretary has employed the following prudent person test to determine whether a mineral deposit is "valuable:"

> where minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

Castle v. *Womble*, 19 Pub. Lands Dec. 455, 457 (1894). This Court has approved the Secretary's prudent person formulation on numerous occasions. See, *e.g.*, *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.4 (1978); *United States* v. *Coleman*, 390 U.S. 599, 602 (1968); *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336 (1963);

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claim complies with all requirements of the general mining law is entitled to obtain a patent to the lands embraced in the claim, which divests the government of title and transfers it to the patent holder. 30 U.S.C. 22, 29; *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 609 (1978); *Boesche* v. *Udall*, 373 U.S. 472, 477 (1963).

The general mining law refers to two categories of mineral claims. A "lode" claim involves "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits * * *." 30 U.S.C. 23. Claims involving all other forms of mineral deposits are denominated as "placer" claims. 30 U.S.C. 35. See *United States* v. *Haskins*, 505 F.2d 246, 251 (9th Cir. 1974); 1 *American Law of Mining* §§ 5.9A, 5.20 (1979 ed.). Claims for cinders are considered to be placer claims.

Individual placer claims are limited to 20 acres per claim (30 U.S.C. 35), and association placer claims are limited to 160 acres per claim (30 U.S.C. 36).

Cameron v. *United States*, 252 U.S. 450, 459 (1920); *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905).

Subsequently, the Secretary refined the prudent person test to require a showing of present marketability:

> the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.

Taking of Sand and Gravel from Public Lands for Federal Aid Highways, 54 Interior Dec. 294, 296 (1933), reaff'g, *Layman* v. *Ellis*, 52 Pub. Lands Dec. 714 (1929); accord, *Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959). Although the marketability aspect of the prudent person test is applicable to all minerals, its practical importance is in respect of claims that are for nonmetallic minerals of wide occurrence, since an intrinsically valuable mineral (*e.g.*, gold or silver), by its very nature, is marketable. *United States* v. *Coleman*, *supra*, 390 U.S. at 603. "On the other hand, where we are concerned with a nonmetallic mineral found in a great many places, application of the prudent person test requires that a market for the mineral be shown by the locator." Solicitor's Opinion, M-36642, 69 Interior Dec. 145, 146 (1962).

In *Coleman* v. *United States*, 363 F.2d 190 (9th Cir. 1966), the Ninth Circuit rejected the marketability test on the grounds that the prudent person test was the only authorized test of value, that the

Secretary had imposed a new test not authorized or warranted by the mining laws, that the administrative precedents relied on were unsound and that the test lacked judicial precedent. This Court reversed, *United States* v. *Coleman*, 390 U.S. 599 (1968), stating that the marketability test (390 U.S. at 602-603):

> does no violence to the statute. Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent-man test" which the Secretary has been using to interpret the mining laws since 1894. * * * The obvious intent [of the mining laws] was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact.
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> * * * * *
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> As we have pointed out above, the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former.

Both before and after *Coleman*, the Secretary has continued to refine the standard for determining whether a mineral deposit is "valuable." The appli-

cation of the prudent person-marketability test to claims for minerals of widespread occurrence in amounts far exceeding any foreseeable market demand for them resulted in the Secretary's developing the concept of excess reserves:

> [i]f an individual has an admittedly valid mining claim which itself contains reserves sufficient to meet the reasonable market demand, giving due consideration to foreseeable expansion and contraction thereof, for a period in excess of 50 years, additional deposits of the same mineral, located by the same individual, effectively have little or no *present* value. Since present value is the benchmark of the marketability test, such additional claims are not valid.

United States v. *Clare Williamson*, 45 I.B.L.A. 264, 294-295 (1980); accord, *United States* v. *Henrietta Bunkowski*, 5 I.B.L.A. 102, 122-126 (1972); *United States* v. *Robert E. Anderson, Jr.*, 74 Interior Dec. 292, 302-304 (1967); cf. *United States* v. *Urban Harenberg*, 11 I.B.L.A. 153, 158 (1973). While a number of court of appeals and district court decisions appear to have recognized the excess reserves analysis,[2] this is

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[2] In *Hallenbeck* v. *Kleppe*, 590 F.2d 852 (10th Cir. 1979), the Tenth Circuit upheld the invalidation of sand and gravel claims where the claimants "failed to show there was a market for more sand and gravel than they were already producing [on their father's ranch, which was located one mile north of the contested claims]." 590 F.2d at 858. The court of appeals also affirmed, as a proper application of the marketability test, the district court's ruling that, under those circumstances, the claimants could not hoard the sand and gravel for future sale. *Id.* at 859. In *Osborne* v. *Hammit*, 377

the first case that squarely presents to a court the issue of the concept's validity.

2. In 1965, respondent applied to the Bureau of Land Management of the Department of the Interior ("BLM") for a patent covering five twenty-acre placer mining claims for cinders known as Wildcat Hill Nos. 1 through 5, located in the Coconino National Forest, east of Flagstaff, Arizona (App. D, *infra*, 21a). At the request of the Forest Service of

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F. Supp. 977 (D. Nev. 1964), the court affirmed the invalidation of three association placer mining claims for sand and gravel in the absence of evidence of any removal or processing of the minerals by the claimants prior to July 23, 1955, noting that "if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the [claims] valueless." 377 F. Supp. at 985.

The Ninth Circuit itself previously appeared to recognize the validity of the excess reserves analysis. In *Clear Gravel Enterprises, Inc.* v. *Keil*, 505 F.2d 180 (1974), the Ninth Circuit upheld the invalidation of two association placer claims for sand and gravel, finding "[o]f particular significance * * * the obvious fact appearing from the record that the quantity of [the claimant's] other sand and gravel holdings in the area, when combined with the state of the market, were such as to deter the [claimant] from expending money and effort to extract and market the sand and gravel from the claims in question from the time of location in 1946 until approximately 1963." 505 F.2d at 181. While in its decision in the present case the Ninth Circuit has attempted to distinguish the foregoing decisions as applications of the marketability standard (App. A, *infra*, 8a-11a), we submit that the concept of excess reserves is simply an application of the prudent person-marketability standard to a particular factual situation (see pages 16-18, *infra*).

the Department of Agriculture, the BLM issued an administrative contest complaint seeking cancellation of respondent's claims (*id.* at 21a-22a).[3] The complaint charged, *inter alia*, that although the cinders claimed constituted a "common variet[y]" within the meaning of 30 U.S.C. 611, the claims did not represent discovery of a valuable mineral before July 23, 1955, as required by that statute (App. E, *infra*, 47a).

Following an evidentiary hearing and a preliminary ruling generally favoring respondent (App. E, *infra*), the Secretary, acting through the Interior Board of Land Appeals ("IBLA"), issued his final decision (App. D, *infra*).[4] The IBLA agreed with

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[3] The BLM subsequently dismissed its complaint as to Wildcat Hill No. 5 (App. D, *infra*, 22a n.3).

[4] A hearing examiner (a change of title from "hearing examiner" to "administrative law judge" was effectuated after the hearing in this case (App. D, *infra*, 20a n.1)) had held that the cinders claimed by respondent represented a common variety under 30 U.S.C. 611 (App. E, *infra*, 53a), and that the claims were perfected by valid discoveries of a valuable mineral deposit prior to July 23, 1955, and were supported by valid discoveries at the time of the hearing (*id.* at 77a). The hearing examiner also ruled that the government's contest was not barred by a state court judgment in favor of respondent in an action brought by a rival claimant to adjudicate title to the claims as between himself and respondent (*id.* at 57a); that all of respondent's claims had been located prior to the conflicting claims (*id.* at 62a); that the claims were not void for untimely recording of the notice of location and had not been abandoned (*id.* at 63a-64a, 69a); and that five acres of claim No. 2 had been withdrawn from the reach of the mining laws prior to the date of respondent's patent application by the issuance of a special use permit to the Arizona

the hearing examiner that the cinders claimed constituted a common variety mineral and that respondent, therefore, was required to establish that all the requirements for a discovery had been met by July 23, 1955, as well as at the time of the hearing (*id.* at 36a-37a). It also acknowledged that the cinder deposit satisfied the prudent person-marketability standard as of July 23, 1955 (*id.* at 36a-37a):

> [o]n the basis of [the prudent person] test we think that Baker was well justified in considering that he had discovered a valuable deposit of cinders on Wildcat Hill and in claiming at least a portion of that deposit under the mining law.
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> [W]e have little difficulty in agreeing with [the hearing examiner] that Baker discovered a valuable deposit of common variety cinders prior to July 23, 1955, for which there was an existent demand, that there was adequate access to the deposit, the deposit was within reasonable proxi-

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Highway Department, thereby invalidating that portion of respondent's claim (*id.* at 80a-81a). The hearing examiner had concluded that a patent covering claims 1 through 4, with the exception of the five acres previously withdrawn, should issue if the patent application were otherwise proper (*id.* at 82a).

The subsequent IBLA decision reached only the question of whether respondent had located valuable mining claims as of July 23, 1955 (see App. D, *infra*). The IBLA, of course, was in no way bound by the prior findings or conclusions of the hearing examiner. *Henault Mining Company* v. *Tysk*, 419 F.2d 766, 767 n.1 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); *Palmer* v. *Dredge Corporation*, 398 F.2d 791, 794 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); *Osborne* v. *Hammit*, 377 F. Supp. 977, 984 (D. Nev. 1964).

mity to the market, and that he then initiated a bona fide effort to develop a mine.

On the basis of testimony that the market for cinders was very competitive, that a substantial portion of the available market was for purposes not cognizable under the mining laws and that cinder operations functioning in the area were only marginally profitable, however, the IBLA was "unable to agree with [the hearing examiner] that the evidence of record is sufficient to support a finding that all four claims were valid on July 23, 1955" (*id.* at 37a). Observing that respondent's patent application stated that his claims covered an estimated 15 million tons of cinders, while the evidence revealed that less than one million tons were removed and sold between 1953 and 1976, the IBLA held that the vast quantity of cinders embraced within respondent's four claims so far exceeded the amount that foreseeably could be marketed as to render imprudent the development of all four of the claims (*id.* at 41a-42a). Relying on its prior decisions articulating the excess reserves analysis,[5] the IBLA affirmed the hearing examiner's validation of claims 2 and 3 and declared null and void claims 1 and 4 on the grounds that the existing workings and improvements were predominantly located on claims 2 and 3 and that the volume of cinders located on those two claims "would assure a source of supply for many years" (*ibid.*).

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[5] *United States* v. *Urban Harenberg*, 11 I.B.L.A. 153 (1973); *United States* v. *Henrietta Bunkowski*, 5 I.B.L.A. 102, 79 Interior Dec. 43 (1972); *United States* v. *Robert E. Anderson, Jr.*, 74 Interior Dec. 292 (1967).

Respondent filed an action for judicial review in the United States District Court for the District of Arizona. On cross motions for summary judgment, the district court dismissed respondent's complaint and action (App. C, *infra*, 17a).[6]

The Ninth Circuit reversed (App. A, *infra*, 1a-15a). Asserting that the IBLA had found that respondent's claims satisfied the prudent person-marketability standard (*id.* at 5a), the court of appeals held (*id.* at 14a-15a) that the IBLA was without authority thereafter to nullify two of the claims on the basis of what the court labeled "a new element, that is, the claimant must now prove that he or she has not claimed 'too much' of the mineral in question" (*id.* at 2a). Finding, moreover, that "the *too much* rule is not workable and is not susceptible of practical application" (*id.* at 14a), the Ninth Circuit concluded that respondent's claims 1 and 4 were valid in all other respects and directed award to respondent of a patent covering those lands (*id.* at 15a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision, if permitted to stand, would allow the withdrawal of large tracts of the public lands for purposes unrelated to the actual development and use of the Nation's mineral re-

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[6] Previously, upon stipulation of the parties, the action as against the United States and the District Ranger of the Forest Service had been dismissed, leaving petitioner as the only defendant. Record on Appeal at 27.

sources. The ruling erroneously restricts the Secretary's authority to refine the standard by which claims of mineral discoveries on the public lands are evaluated. The importance of the issue to the administration of the public lands warrants this Court's intervention.

1. The application of the excess reserves analysis to the facts of this case is an appropriate exercise of the Secretary's authority to determine the validity of claims against the public lands.

a. By its decision in this case, the Ninth Circuit has once again attempted to thwart the Secretary's exercise of his authority and, indeed, his responsibility "to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable.' " *United States* v. *Coleman*, *supra*, 390 U.S. at 602; accord, *Cameron* v. *United States*, 252 U.S. 450, 459-460 (1920). As it did in *Coleman* v. *United States*, 363 F.2d 190 (1966), rev'd, 390 U.S. 599 (1968), the Ninth Circuit has struck down the Secretary's application of the standard for discovery of a valuable mineral deposit to a particular factual situation as "an abuse of discretion which was contrary to existing mining law" (App. D, *infra*, 15a). That ruling is premised upon a misconception regarding the source of the law governing mineral discoveries on the public lands.

"The cornerstone of federal legislation dealing with mineral lands is the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22," which permits citizens to acquire patents to many types of minerals located on the

public lands and to the lands bearing those minerals. *United States* v. *Coleman, supra*, 390 U.S. at 600 n.1. Section 22, however, describes the mineral lands open to patent simply as those containing "valuable mineral deposits," and no further definition is provided anywhere in the statutory scheme. *Converse* v. *Udall*, 399 F.2d 616, 619 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). "The Secretary of the Interior is 'charged with seeing . . . that valid claims . . . [are] recognized, invalid ones eliminated, and the rights of the public preserved.'" *United States* v. *Coleman, supra*, 390 U.S. at 600 n.1, quoting *Cameron, supra*, 252 U.S. at 460.

Pursuant to this responsibility, the Secretary developed the prudent person-marketability standard for determining whether a discovery of "valuable mineral deposits" had been made (see pages 5-7, *supra*). Under this standard, the benchmarks of a "valuable" mineral deposit are present marketability and, thus, present value. *Hallenbeck* v. *Kleppe*, 590 F.2d 852, 859 (10th Cir. 1979); *Roberts* v. *Morton*, 549 F.2d 158, 163 (10th Cir. 1976); *Barrows* v. *Hickel*, 447 F.2d 80, 83 (9th Cir. 1971); *Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959); *United States* v. *Estate of Alvis F. Denison*, 76 Interior Dec. 233, 239-240 (1969); see *Andrus* v. *Shell Oil Co.*, No. 78-1815 (June 2, 1980), slip op. 15 n.11.[7]

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[7] In *Andrus* v. *Shell Oil Co., supra*, this Court held that the Mineral Lands Leasing Act, 30 U.S.C. 181 *et seq.*, which withdrew oil shale and several other minerals from purchase under the mineral laws, but preserved valid claims in existence at the

Contrary to the Ninth Circuit's conclusion that the IBLA employed a new or additional test in the present case, the Secretary's excess reserves concept is simply the application of the well established prudent person-marketability standard to the particular factual situation in which the volume of minerals encompassed in multiple claims far exceeds the foreseeable market.[8] By definition, when the minerals in a given claim exceed the foreseeable market, they are not "presently marketable." Nor do they have "present value," as the Secretary, through the IBLA, explained in *United States* v. *Clare Williamson*, 45 I.B.L.A. 264, 294-295 (1980):

> [t]he value of all minerals, with the possible exception of intrinsically valuable minerals such as gold and silver, is directly related to the mar-

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time of the passage of the Act, did not require proof of present marketability of pre-existing oil shale claims. In so holding, the Court noted that the legislative history of the Mineral Lands Leasing Act and the subsequent congressional action on which the Court relied "indicate[ ] only that a present marketability standard does not apply to oil shale. It does not affect our conclusion in *United States* v. *Coleman* that for other minerals the Interior Department's profitability test is a permissible interpretation of the valuable mineral requirement." *Andrus* v. *Shell Oil Co.*, *supra*, slip op. 15 n.11.

[8] In contrast to the Ninth Circuit's suggestion (App. A, *infra*, 5a), the IBLA did not find that all four of respondent's claims satisfied the prudent person-marketability standard. Rather, it was the IBLA's conclusion that the cinder *deposit* satisfied the prudent person-marketability test. It is a well established principle, however, that each mineral claim must individually and independently meet the relevant standard. *Cole* v. *Ralph*, 252 U.S. 286, 295 (1920).

> ket for the minerals. Thus, if we assume that the market for a mineral is 1,000 tons a year, an individual with a supply of 10,000 tons would be capable of fulfilling market requirements for the next 10 years. In the first year, the value of an initial 1,000 tons is the market value. The value of the subsequent tonnage, however, is discounted owing to the inability to market it immediately. This is not to say that the remaining 9,000 tons is valueless. Rather, each ton's relative present value declines depending upon how long it is necessary to wait until it can be marketed. If, however, we assume that the mining entity has a total supply of 1,000,000 tons of mineral, but that the market will still only absorb 1,000 tons a year, it will be seen that a vast amount of the tonnage effectively has no present value. If we assume a static market demand, it will take 1,000 years to market the entire mineral supply. The present value of earnings a millenium in the future can safely be viewed as zero.
>
> This is the problem with which the concept of excess reserves deals.

Accord, *United States* v. *Henrietta Bunkowski*, 5 I.B.L.A. 102, 122-126 (1972); *United States* v. *Robert E. Anderson, Jr.*, 74 Interior Dec. 292, 302-304 (1976); cf. *United States* v. *Urban Harenberg*, 11 I.B.L.A. 153, 158 (1973).

In the present case, respondent's patent application stated that his claims covered an estimated 15 million tons of cinders. Yet, the evidence revealed that less than one million tons had been disposed of be-

tween 1953 and 1976 (App. D, *infra*, 37a). At that rate, it would take respondent approximately three hundred years to dispose of the total quantity of cinders he has claimed, assuming that market conditions remain constant. The total amount of respondent's claims is, therefore, neither presently marketable nor presently valuable.

The Secretary's requirement of a presently available market for at least some of the mineral material encompassed in a given claim is soundly based in the statutory scheme. The basic purpose of the mining laws is to promote actual development and use of the nation's mineral resources.[9] This statutory policy is not fostered by the recognition of claims that will remain idle for the indefinite future and may never be exploited. Nor is it fostered by a rule of law that would permit mineral hoarding and other abuses, nor uses unrelated to the actual mining of valuable mineral deposits.

b. The "practical" objections to the concept of excess reserves voiced by the Ninth Circuit (App. A, *infra*, 14a) reveal that court's failure to understand the doctrine itself. The excess reserves analysis has nothing to do with the rate of extraction of the minerals, but rather with the capacity of the relevant market to absorb them. Thus, the court of appeals' suggestion that such an analysis would discriminate

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[9] "Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes." *United States* v. *Coleman*, *supra*, 390 U.S. at 602 (footnote omitted).

among claimants depending on their size and wealth is specious. Nor would the concept make preferable the location of a claim on a mediocre deposit to one on a superior deposit, since, assuming that the claim on the mediocre deposit were presently marketable, at least part of the minerals on the superior deposit would equally be presently marketable. Finally, as to the range of applicability of the analysis, the excess reserves concept, like the general marketability standard of which it is a part, would apply to all locatable minerals, in all geographic regions in which the public lands are located. But, like the marketability standard itself (see page 6, *supra*), the excess reserves concept will have little or no impact on intrinsically valuable metallic minerals. Cf. *United States* v. *Coleman*, *supra*, 390 U.S. at 603. Similarly, it will have little effect on claims for commonly available minerals of which the supply does not dwarf the demand.

Again, like the prudent person-marketability test, the excess reserves analysis, while objective, is admittedly somewhat imprecise. This imprecision, however, is not sufficient reason to discard the salutary doctrine in which it inheres. Rather, the Secretary should be permitted to develop the excess reserves concept in the same way in which *Coleman* permitted him to develop the prudent person-marketability standard—through case-by-case adjudication, subject to appropriate judicial review, in which the reviewing courts accord appropriate deference to the views of the agency "charged with principal responsibility for

'regulating the acquisition of rights in the public lands.'" *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 614 (1978), quoting *Cameron* v. *United States, supra*, 252 U.S. at 460; accord, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

2. The decision below will result in the withdrawal of large tracts of the public lands for purposes unrelated to mining.[10] Although only forty acres are at issue in the present case, we have been advised by the Department of the Interior that there are currently pending several other multiple claims for substantially greater acreage, which would be subject to the excess reserves analysis. The present ruling, moreover, predictably will invite other like applications for patent —which must be granted if the ruling below stands.[11]

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[10] The problem remains important despite the enactment of the Act of July 23, 1955, ch. 375, Section 3, 69 Stat. 368, 30 U.S.C. 611, since that legislation only withdrew from patentability deposits of common varieties of sand, stone, gravel, pumice, pumicite and cinders that were located after the date of the statute. Numerous claims for common variety minerals located prior to July 23, 1955, remain outstanding. Moreover, the excess reserves analysis is applicable to minerals other than common varieties, although the primary effect of the analysis would be on common variety minerals (see page 19, *supra*).

[11] Although possibly subject to other mining law defects as well, multiple claims for 1600 acres containing sand and 2,000 acres containing perlite are presently being contested by the government on the basis of excess reserves. The Department of the Interior is also aware of 400,000 acres of public lands covered by claims for bentonite in Wyoming alone. Claims blanketing an entire mountain of limestone were recently settled after the government invoked the excess reserves concept.

No legislative solution to the problem is probable. Indeed, any statute embodying the excess reserves concept would presumably be effective only prospectively (as is 30 U.S.C. 611 (see note 10, *supra*)), since a claimant's interest in a mining claim, if valid, is a property interest. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336 (1963). Therefore, even in the event of congressional action, large amounts of the public lands could be withdrawn for purposes not intended by Congress.

Nor is the excess reserves analysis likely to be presented in any other case, since the IBLA now deems itself bound by the Ninth Circuit's decision, which will preclude any further judicial consideration of the concept.[12] Thus, absent review by this Court, the Secretary will be foreclosed from invoking the excess reserves analysis to effectuate Congress' intent to

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[12] Since the Secretary acts through the IBLA, he cannot seek judicial review of an adverse decision by that body. And, since any decision that follows the Ninth Circuit's holding in this case would be favorable to mining claimants, no claimant will have cause to bring the excess reserves analysis to the attention of the courts.

Moreover, even if the IBLA were to deny another claim on the basis of the existence of excess reserves, judicial review of that decision most likely would be in the Ninth Circuit, where the preponderance of minerals of widespread occurrence is located (although venue is also available in the District Court for the District of Columbia (28 U.S.C. 1391(e)), it is unlikely that a mining claimant would choose that alternative forum). A conflict among the courts of appeals on the excess reserves question, which might more sharply define the issue for review by this Court, is, therefore, unlikely. But see cases cited in note 2, *supra*, for colorable conflicts that already exist.

make the public lands available "for the purpose of mining valuable mineral deposits and not for other purposes." *United States* v. *Coleman*, *supra*, 390 U.S. at 602 (footnote omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-2783

DC Civ-76-408-PCT-WPC

[Filed Feb. 11, 1980]

MELTON E. BAKER, PLAINTIFF-APPELLANT

vs.

UNITED STATES OF AMERICA; CECIL D. ANDRUS, individually and as Secretary of the Interior; STANLEY GRUNEWALD, individually and as District Ranger of the Forest Service of the United States, Department of Agriculture, DEFENDANTS-APPELLEES

OPINION

On Appeal from the United States District Court for the District of Arizona

Before: SNEED and ANDERSON, Circuit Judges, and PORT,* District Judge.

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* The Honorable Edmund Port, Senior United States District Judge for the Northern District of New York, sitting by designation.

J. BLAINE ANDERSON, Circuit Judge:

This court is called upon to review an administrative extension of the marketability test which is used for proving the validity of mining claims. This extension adds a new element, that is, the claimant must now prove that he or she has not claimed "too much" of the mineral in question. After a thorough review of the mining laws, we conclude that there is no basis to support the *too much* rule. We therefore vacate the judgment of the district court which had affirmed the decision of the Interior Board of Land Appeals (IBLA). 23 IBLA 319 (1976).

I. FACTS

The defendants concede that there is no dispute about the facts of this case. In 1952 the appellant Baker began to mine cinders from a cinder cone in the Coconino National Forest near Flagstaff, Arizona. Baker filed a patent application for five placer mining claims on the volcanic field in 1965. The claims were described as Wildcat Hill numbers one through five.

The Bureau of Land Management, at the request of the Forest Service, began administrative proceedings against Baker's claims in 1966. Cancellation of all the Wildcat Hill claims was initially sought, but the allegations concerning the fifth claim were later dismissed from the complaint. The proceedings below decided the validity of the remaining four Wildcat claims.

After conducting a five-day hearing, a hearing officer validated all four of Baker's claims in 1970. The Forest Service then appealed this decision to the IBLA. Although the IBLA agreed with the factual findings made by the hearing officer, the patents on the number one and four claims were declared null and void, while the validity of the number two and three claims was upheld. The IBLA based its decision on its finding that all four of the claims, considered together, covered 15 million tons of cinders. This was, according to the IBLA, *simply too much.* The second and third claims were singled out for approval because most of Baker's workings and improvements were located on them.

Baker applied for review of the IBLA decision in the district court which had jurisdiction under 28 U.S.C. § 1331(a). *See Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.6 (1978); *Doria Mining & Engineering Corp.* v. *Morton*, —— F.2d —— n.1, slip op. 533, 535 n.1 (9th Cir., Nov. 2, 1979). On cross motions for summary judgment, the district court dismissed the complaint and action. Baker then filed a timely notice of appeal to this court which has jurisdiction under 28 U.S.C. § 1291.

II. MINING LAWS

The basic philosophy underlying federal mining law is that all valuable mineral deposits on federally-owned mineral land are open to exploration and purchase. 30 U.S.C. § 22. Generally, by complying with certain procedural requirements, a person may locate

a claim on federal land. *Charlestone Stone Products Co., supra,* 436 U.S. at 606. One who does so gains the exclusive right to possess the land and extract minerals from it. *Id.*

At issue in the present case is whether Baker's first and fourth claims were valuable mineral deposits so as to come within the terms of 30 U.S.C. § 22.

Over the years, two complementary tests have been developed for determining whether a mineral discovery is valuable. Under the prudent-man test, "the discovered deposits must be of such a character that 'a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. . . .'" *United States* v. *Coleman,* 390 U.S. 599, 602 (1968), *quoting Castle* v. *Womble,* 19 LD 455, 457 (1894). The marketability test requires a showing that the mineral can be extracted and marketed at a profit. *Coleman, supra,* 390 U.S. at 600. In *Foster* v. *Seaton,* 271 F.2d 836 (D.C. Cir. 1959), the marketability test was explained as follows:

> "Thus, such a 'mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, *existence of present demand,* and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.'" (citations omitted)

271 F.2d at 838 (referred to as the *Foster* v. *Seaton* test.) This court has specifically approved the *Foster*

v. *Seaton* test. *Verrue* v. *United States*, 457 F.2d 1202, 1203 (9th Cir. 1972).

Since common varieties of cinder, such as that claimed by Baker, were removed from location under the mining laws on July 23, 1955, the validity of his claims must be tested as of then.[1]

In its decision, the IBLA agreed with the hearing officer that Baker had satisfied both the "prudent-man" and "marketability" tests. The IBLA found that "Baker discovered a valuable deposit of common variety cinders prior to July 23, 1955, for which there was an existent demand, that there was an adequate access to the deposit, the deposit was within reasonable proximity to the market, and that he then initiated a bona fide effort to develop a mine." 23 IBLA at 332. By this the IBLA held that Baker had met the *Foster* v. *Seaton* test for proving marketability. After concluding that Baker had met the two traditional tests, the IBLA went on to find that

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[1] In 1955, Congress adopted an Act which was commonly referred to as The Surface Resources Act. 69 Stat. 367, *et seq.*; 30 U.S.C. §§ 601, 611, *et seq.* Section 3 of this Act specifically provided that: "[a] deposit of common varieties of sand, stone, gravel, pumice, pumicite, or *cinders* shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter [July 23, 1955] located under such mining laws . . . ." (emphasis added) *See* 30 U.S.C. § 611. Since Baker's claims were located prior to 1955, this broad exclusion did not affect his claims except to set the time (July 23, 1955) for proving the validity of his discovery.

Baker had located claims in excess of the reasonably anticipated market need for cinders (the *too much* test). Because of this, the IBLA held that Baker's less developed claims one and four were void for lack of discovery.

III. STANDARD OF REVIEW

In reviewing decisions of the IBLA, this court exercises a limited standard of review. *Multiple Use Inc.* v. *Morton*, 504 F.2d 448, 452 (9th Cir. 1974); *see Henrikson* v. *Udall*, 350 F.2d 949, 950 (9th Cir. 1965), *cert. denied*, 384 U.S. 940. We cannot merely substitute our judgment for that of the IBLA. *Multiple Use Inc., supra*, 504 F.2d at 452; *see United States* v. *Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 448 (9th Cir. 1971). Our review is limited to an examination of whether the decision of the IBLA was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law. 5 U.S.C. § 706; *see United States* v. *Wharton*, 514 F.2d 406, 408-409 (9th Cir. 1975).

Baker's central argument on appeal is his challenge to the legal standard (the *too much* test) which was applied by the IBLA to invalidate claims one and four. Because there is no dispute over the facts, the substantial evidence standard has no bearing on this case and our review is therefore limited to the IBLA's determination of the applicable law. *See Ballard E.*

Spencer Trust, Inc. v. *Morton*, 544 F.2d 1067, 1069 (10th Cir. 1976). Generally, great deference is shown to an administrative agency's interpretation of the law which it is charged with administering.[2] *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). However, the courts do not merely "stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965), *quoted in Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968). Nor will the courts "defer to an administrative construction where there are compelling indications that it is wrong." *Marathon Oil Co.* v. *Kleppe*, 556 F.2d 982, 986 (10th Cir. 1977). With these considerations in mind, we now turn to the *too much* test which was relied upon to invalidate Baker's claims one and four.

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[2] This deference is by no means absolute, as the Supreme Court has stated:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Skidmore v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

IV. THE TOO MUCH TEST

Interior [3] argues that the mining laws, its own decisions, and single court decision established the excess reserve or the *too much* test, and support its application to the present case.[4] Our examination leads us to the opposite conclusion.

The only court decision [5] relied upon by Interior is this Court's decision in *Clear Gravel Enterprises* v.

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[3] For purposes of clarity we refer to the defendants as Interior although the named defendants are actually from the Department of Agriculture as well as the Department of Interior.

[4] In its most ingenuous argument, the government says that a claimant (such as Baker) should not be able to curtail competition by removing a mineral source from the public lands which the government would otherwise be able to sell itself under 30 U.S.C. § 601. In fact, the government has offered Baker the opportunity, for a price, of continuing his mining operations on the disputed first and fourth claims. And so the government maintains two rather contradictory positions in regard to the two disputed mining claims. In its management of the disputed claims pending this appeal, the government apparently believes that, in view of the foreseeable needs of the market and Baker's need for the mineral, Baker may want to mine the disputed claims for a reasonable fee. However, for purposes of this lawsuit, the government argues that Baker had located an excess supply of cinders in view of his needs and the foreseeable needs of the market.

[5] The recent case of *Hallenbeck* v. *Kleppe*, 590 F.2d 852 (10th Cir. 1979), does not support Interior's *too much* test. In *Hallenbeck* the plaintiffs argued that the district court erred by holding that a mineral claimant cannot hoard valuable minerals. The Tenth Circuit rejected this by finding that the lower court had properly applied the test of *present* marketability. 590 F.2d at 859. Moreover, there had been *no* sales from the contested claims in *Hallenbeck*. 590 F.2d at 857.

Keil, 505 F.2d 180 (9th Cir. 1974), *cert. denied*, 421 U.S. 930. However, *Clear Gravel* cannot be read as establishing or even supporting a *too much* test. In that case this court was merely reviewing whether there was substantial evidence to support the finding that the claimant had failed to satisfy the marketability test. In a brief per curiam decision we made the following observation:

> "While the marketability of the mineral could have been demonstrated by the Appellant by a showing of its accessibility, its proximity to the market, the demand for it and by the Appellant's bona fide efforts to develop the claims and compete in the market with the product extracted from those claims, nonetheless, the record demonstrates that Appellant's evidence fell far short of the required showing."

505 F.2d at 181. This was simply a restatement and application of the *Foster* v. *Seaton* test for determining marketability. The decision then went on to summarize some of the evidence. This had included the testimony of two government experts who said that the minerals could not be extracted, removed and marketed at a profit, and the fact that the contested claims had never been developed during the relevant period because of the appellant's other holdings. By mentioning the claimant's other holdings, this court was merely looking at the actual development of the claims in question, a factor which is

properly considered under the marketability test.[6] We did not intend to add a new factor to the marketability test, nor did we intend to implicitly approve the *too much* test.

Interior cites three IBLA decisions as support for the *too much* rule: *United States* v. *Anderson*, 74 I.D. 292 (1967); *United States* v. *Bunkowski*, 5 IBLA 102 (1972); and *United States* v. *Harenberg*, 11 IBLA 153 (1973). However, none of these decisions can be viewed as even persuasive authority since the first two share the same faulty premise and the last dcision did not even address the issue.

The IBLA observed in *Harenberg* that it was not necessary to consider the excess reserve issue. 11 IBLA a 158. That was the sum total of the discussion. This court refuses to consider what is not discussed in a decision as precedent for establishing such a radical departure from previous law.

Neither *Bunkowski* nor *Anderson* relies on any statutory authority in support of the *too much* test. The only authority which is relied upon is the district court decision in *Osborne* v. *Hammit*, 377 F.Supp. 977 (D.Nev. 1964). *See Anderson*, *supra*, 74 I.D. at 302-303; *Bunkowski*, *supra*, 5 ILBA at 122-125. However, an examination of the *Osborne* decision re-

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[6] The actual development of a contested claim is only one of several factors which are considered. It is not the only consideration. *See Edwards* v. *Kleppe*, 588 F.2d 671, 673 (9th Cir. 1978); *Melluzzo* v. *Morton*, 534 F.2d 860, 863 (9th Cir. 1976); and *Barrows* v. *Hickel*, 447 F.2d 80, 82 (9th Cir. 1971).

veals that it cannot be used as a foundation for the *too much* test and that the reliance on it in *Bunkowski* and *Anderson* was misplaced. In *Osborne* the district court was reviewing an Interior Department decision to cancel mining claims for sand and gravel located near Las Vegas, Nevada. The court observed that the contested claims were similar to other sand and gravel claims which covered over 100,000 acres of land in the Las Vegas area. Furthermore, the claimants had made no attempt to develop the contested claims. The court, in approving Interior's holding that the claimants had failed to satisfy the marketability test, followed the *Foster* v. *Seaton* test. The court said that, had the claimants actually begun production of the sand and gravel and successfully entered the market, then the *Foster* v. *Seaton* marketability test would have been satisfied. 377 F.Supp. at 985. Because the claimants had never attempted to work their claims, the court refused to credit their "speculative, hypothetical and theoretical testimony" which was offered to show that they could have extracted and marketed the mineral. 377 F.Supp. at 985-986.

The *Osborne* decision obviously supports neither the result nor the test which was used in the present case. Baker had, in fact, developed and marketed the cinders from claims one and four. Access roads were on the claims. Baker was not relying upon speculative, hypothetical, or theoretical proof, since he had actually extracted and marketed cinders from the contested claim at a profit. Furthermore, the IBLA con-

cluded that Baker had satisfied the *Foster* v. *Seaton* formulation of the marketability test. It was only after drawing that conclusion that the IBLA went on to apply its *too much* or excess reserve test to Baker's claims. Although the Interior decisions do support such a test, they are both based upon a misreading of *Osborne*, which we choose not to follow.

Although Interior claims statutory support for the *too much* rule, our examination of the statutes and their legislative history revealed nothing which even inferentially supports such a departure from previous mining practice. The *too much* test limits the overall amount of mineral and land an individual can claim under the mining laws. Although the mining laws limit the size of claims,[7] they have never set a limit on the number of claims an individual may stake and work.[8] The validity of a claim has always been de-

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[7] *See* 30 U.S.C. §§ 35, 36 (limit on the size of placer claims); 30 U.S.C. § 23 (limit on the size of claims on veins or lodes).

[8] In *United States* v. *California Midway Oil Co.*, 259 F. 343 (S.D. Cal. 1919), *aff'd* 279 F. 516 (9th Cir. 1922), *aff'd* 263 U.S. 682 (1923), the court made the following observation:

> ". . . There is so far no law of Congress or regulation made in pursuance thereof limiting the number of placer mining claims an individual or association of individuals may make. On the contrary, the policy of the government seems to be to encourage the development of its mineral resources and to offer every facility for that purpose."

259 F. at 351-352. Judge Bean's statement about there being "no law" is just as applicable today as it was when it was made in 1919. Judge Ross of this court, concurring in the affirmance of Judge Bean's opinion, noted that "Congress has

termined by an inquiry into that particular claim, not by an examination of the individual's other claims. The *too much* test changes the focus of the relevant inquiry. Although Congress has addressed various abuses under the general mining laws,[9] it has never attempted to either limit the amount of mineral, or the overall number of claims, which can be patented by an individual.

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never fixed any limit to the number of [claim] locations that may be made by the same person or persons. . . ." *California Midway, supra,* 279 F. at 521 (Ross, J., concurring).

For other cases which hold that there is no limit on the number of claims an individual may stake, see for example: *Houck* v. *Jose,* 72 F.Supp. 6, 9-10 (S.D. Cal. 1947), *aff'd* 171 F.2d 211 (9th Cir. 1948) ("an association *is not limited to one* [mining] *location.* . . ."); *United States* v. *Brookshire Oil Co.,* 242 F. 718, 721 (S.D. Cal. 1917) ("[i]t is true there is no limitation as to the number of mining claims an individual or association of individuals may locate. . . ."); *Riverside Sand & Cement Mfg. Co.* v. *Hardwick,* 16 N.M. 479, 120 P. 323, 324 (1911) ("there is no limit to the number of claims which may be located by one person or association of persons. . . .").

[9] For instance, when Congress passed The Surface Resources Act (*see* n.1, *supra*), it sought to correct various abuses under the mining laws. *See* H.R. Rep. No. 730, 84th Cong., 1st Sess., *reprinted in* 2 [1955] U.S. Code Cong. & Ad. News 2474. One problem was the location of claims for purposes other than mining, prospecting, processing or related activities. The location of *too much* of a mineral by any one claimant was not addressed, and implicitly may not have been considered either a problem under, or an abuse of, the mining laws. Especially, in view of the fact that Congress, with this Act, "did not intend to change the basic principles of the mining laws." *Converse* v. *Udall,* 339 F.2d 616, 617 (9th Cir. 1968), *cert. denied,* 393 U.S. 1025.

Moreover, the *too much* rule is not workable and is not susceptible of practical application. Under the rule, Interior reserves to itself the decision as to how slowly or rapidly a claim can be worked. Will the large well-endowed corporation, association or individual, with extensive and valuable open-pit or subsurface claims, be subject to the same standards as the sole "pack-string" prospector? Will claimants of all variety now be forced to locate and claim only mediocre discoveries, exploitable within 1, 5 or 10 years? Will claimants be forced to overlook those claims with extremely rich and extensive deposits which may require many more years to develop and exploit, but which are by all present day statutes and relevant decisions legally exploitable claims? Upon what objective, predictable and manageable criteria will government mining law administrators and the IBLA base important and far-reaching decisions in arriving at a conclusion of *too much*? To what locality or geographic region will it apply? To what classification of mineral deposits will it apply? To what geologic structures will it apply? The list is virtually endless. The *too much* rule is, in our view, a wholly unreliable subjective analysis, resting too much in the eye of the administrative beholder.

The IBLA exceeded its discretionary and statutory powers when it adopted its *too much* or excess reserves rule. Although Congress may see fit to deal with the issue, it has never done so. The IBLA decision amounts to a legislative enactment by an execu-

tive tribunal. The IBLA possesses no such authority under our system of separation of powers.

V. CONCLUSION

In sum, we hold that the IBLA's adoption of the *too much* rule was an abuse of discretion which was contrary to existing mining law. The result reached was arbitrary and capricious. The IBLA found that Baker had satisfied both the prudent man and the marketability tests, but went on to invalidate claims one and four under the *too much* test. Since claims one and four were otherwise valid, Baker is entitled to a patent for them.

We therefore vacate the dismissal of the instant complaint and remand to the district court for it to enter an order directing the IBLA to validate Baker's claims one and four.

VACATED and REMANDED, with directions.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-2783

DC CV 76-408 WPC

MELTON E. BAKER, PLAINTIFF/APPELLANT

vs.

THOMAS KLEPPE, individually and as Secretary of the Interior, ET AL., DEFENDANTS/APPELLEES

APPEAL from the United States District Court for the District of Arizona (Phoenix)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is vacated and remanded with directions.

Filed and entered February 11, 1980.

APPENDIX C

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed Apr. 25, 1977]

Civil Action File No. 76-408-PHX WPC

MELTON E. BAKER

vs.

UNITED STATES OF AMERICA, ET AL.

JUDGMENT

This action came on for (hearing) before the Court, Honorable WM. P. COPPLE, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing and that the complaint and action are dismissed.

Dated at Phoenix, Arizona, this 25th day of April, 1977.

W. J. FURSTENAU
Clerk of Court

By: /s/ Florence M. Wenberg
Deputy Clerk

APPENDIX D

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

UNITED STATES

v.

MELTON E. BAKER

IBLA 71-137 Decided January 19, 1976

Appeal from decision of Administrative Law Judge Robert W. Mesch dismissing, in part, contest complaint and holding valid the Wildcat Hill Nos. 1 through 4 placer mining claims (Arizona 034727).

Affirmed in part, reversed in part.

1. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

   A discovery exists where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity

   The Act of July 23, 1955, 30 U.S.C. § 611 (1970), removed common varieties of cinder from location under the mining laws; thus, it is incumbent upon one who located a claim prior to that date for a common variety of cinder to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date.

   23 IBLA 319

3. Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability—Mining Claims: Excess Reserves

   Material which is suitable only for fill purposes, road base, or comparable uses is not locatable under the mining laws, and even if the material is suitable for other purposes, its sale for the above uses cannot be considered in determining its marketability to establish the value of the deposit as mineral. By the same token, it is improper to consider the market demand for such uses for the purpose of determining what volume of mineral material a prudent locator might claim in the reasonable anticipation of market demand for legitimate mineral uses in the foreseeable future, reasonably projected.

4. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Excess Reserves

Where it has been shown as to a number of mining claims located for cinders for which application for patent has been filed, that the amount of the deposits on the claims is excessively large in relation to the market that exists, only those claims can be found valid which by reason of location and volume and quality of deposits would make the most feasible mining operation and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery.

APPEARANCES: Richard L. Fowler, Esq., Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for appellant; William N. Hackenbracht, Esq., Tognoni & Pugh, Phoenix, Arizona, for appellee.

OPINION BY
ADMINISTRATIVE JUDGE STUEBING

The Forest Service, Department of Agriculture, has appealed from the November 27, 1970 decision of Administrative Law Judge Robert W. Mesch[1] dismissing, in part, a contest complaint against the Wildcat Hill Nos. 1 through 4 placer mining claims on the basis of his finding that the claims were properly located and a discovery of a valuable mineral deposit was established on each of the claims prior

[1] A change of title from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission and implemented by amendment of 43 CFR Subtitle A, 38 F.R. 10939 (1973).

to July 23, 1955, and continued to the time of the hearing.

On March 19, 1965, Melton E. Baker filed patent application Arizona 034727 for the Wildcat Hill Nos. 1 through 5 placer mining claims in section 9, T. 21 N., R. 8 E., G.&S.R.M., Coconino County, Arizona. The subject claims were alleged to have been originally located by Baker in 1952, with the location notices placed on the ground at that time. Copies of location notices for the claims were not recorded until February 23, 1965.[2] The claims are situated in the Coconino National Forest adjacent to U.S. Highway 66, and lie a few miles east of the city of Flagstaff, Arizona. The claims rest upon a cinder cone within a volcanic field and were located by appellee for their cinder material.

On April 8, 1954, the Harenberg No. 2 association placer mining claim was recorded in the office of the Coconino County Recorder. This claim covers the exact area encompassed by the Wildcat Hill Nos. 1 through 4 claims. The co-locators were Urban M. Harenberg, LaVaun Harenberg, Andrew J. Morgan, and the appellee, Melton E. Baker.

At the request of the Forest Service, the Bureau of Land Management issued a complaint on August 15,

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[2] In his patent application, Baker stated that in the event his locations were deemed insufficient under pertinent mining laws, he was claiming the land, alternatively, pursuant to 30 U.S.C. § 38 (1970), and that the applicable State statute required 5 years of occupancy for a claim of adverse possession to be actionable.

1966, seeking the cancellation of the Wildcat Hill Nos. 1 through 5 and Cinder placer mining claims.[3]

On October 8, 1965, Harenberg had filed with the Department a mineral adverse claim against Baker's patent application insofar as the Wildcat Hill Nos. 1 through 4 claims were concerned. *See* 30 U.S.C. § 29 (1970). On November 1, 1965, Harenberg initiated a suit, *Harenberg* v. *Baker*, Civ. No. 22652, in the Coconino County Superior Court, challenging Baker's title to the claims. A Departmental hearing on the Wildcat Hill contest was suspended pending the outcome of the civil action. *See* 30 U.S.C. § 30 (1970).

On June 2, 1967, the Judge of the Superior Court issued his decision in *Harenberg* v. *Baker*, which included, in part, the following findings and conclusions: (a) Baker had produced and sold cinders from the claims continuously since the fall of 1952, "having produced approximately 4,000 cubic yards of cinders in 1952, 7,000 in 1953, 7,000 in 1954, and approximately 1,000,000 from 1952" to the date of judgment; (b) in 1952, Baker posted location notices and put up corner monuments for the Wildcat Hill Nos. 1 through 4 placer mining claims, but did not record any copies of the location notices until February 23, 1965; (c) Harenberg informed Baker that the latter could not hold title to the area in question

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[3] On the same date, the Bureau issued a complaint against Baker and Harenberg seeking cancellation of the Harenberg No. 2 claim. The Wildcat Hill No. 5 and the Cinder claims were later dismissed from the complaint now before the Board.

because one person could not locate contiguous placer mining claims, and this misstatement was a material factor in causing Baker to enter into an agreement with Harenberg permitting the location of the Harenberg No. 2 claim and requiring Harenberg to purchase cinders from the claim for use in making cinder blocks; (d) Baker did not intend to abandon his pre-April 8, 1954, location rights; and (e) prior to April 8, 1954 (when the Harenberg No. 2 claim was recorded), Baker had good title to the area in question under his Wildcat Hill Nos. 1 through 4 unpatented mining claims through pedis possessio, subject only to the paramount title of the United States.[4]

After the Superior Court judgment became final, a 5-day Departmental hearing to determine the validity of the claims was held commencing November 3, 1969, at Flagstaff, Arizona.[5] Thereafter, in his decision dated November 27, 1970, Judge Mesch determined that: the cinder deposits found within the

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[4] The Superior Court Judge also concluded that Baker had established his sole title to the area in question by adverse possession, pursuant to A.R.S. § 12-526 and § 12-527.

[5] We note that the Superior Court Judge held that Baker had established discoveries on his claims. Although a state court may afford a presumption of discovery to the locators of a mining claim in determining possession between private claimants, such presumptions are in no respect applicable or binding in contests between the United States Government and the claimants to determine whether a valid discovery has been made. *See Perego* v. *Dodge*, 163 U.S. 160, 168 (1896); *United States* v. *Fleming*, 20 IBLA 83 (1975); *United States* v. *Ramsey*, 14 IBLA 152 (1974); *Estate of Bowen*, 14 IBLA 201, 81 I.D. 30 (1974).

claims were "common varieties" within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970) (Decision at 5); the contestee established by a preponderance of the evidence that he located the four Wildcat Hill claims and was asserting rights in the lands under the mining laws prior to the location of the Harenberg No. 2 claim in 1954 (Decision at 10); the locations covering the subject claims were not defective for failure to timely record the location notices (Decision at 11); the subject claims were not abandoned by Baker when he joined in the Harenberg No. 2 location (Decision at 14); the contestant did not present a prima facie case in support of the allegations that the claims were not supported by valid discoveries prior to July 23, 1955, or at the time of the hearing (Decision at 16, n. 20);[6] the contestee showed by a preponderance of the evidence that the subject claims were perfected by valid discoveries prior to July 23, 1955, and that the claims were supported by valid discoveries at the time of the hearing.

In its Statement of Reasons on Appeal, appellant argues that the Administrative Law Judge reached a number of erroneous conclusions in the areas of (1) the validity of the various purported mining locations, (2) the issue of abandonment or forfeiture, and (3) the issue of whether the contestee had satisfied

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[6] Judge Mesch added that, "It would not, however, serve any useful purpose to grant the contestee's motion to dismiss the procedings on this ground. The Forest Service could simply institute another contest * * *."

the requirements for establishing the existence of a "valid discovery" on each of the subject claims. On the third point, appellant urges that the Administrative Law Judge did not apply a proper test with respect to the existence of discoveries on the subject claims. Appellant concludes that "since the contestee failed to show that this [discovery] test had been met by him prior to July 23, 1955, the claims should each be declared null and void for this reason, if not on the basis of the other issues." (Statement of Reasons at 11).

At the hearing Gilbert J. Matthews was called as an expert witness on behalf of the contestant (Tr. 29). Matthews is a mineral examiner employed by the Forest Service.

Matthews was of the opinion that Baker had not established a discovery of a valuable mineral deposit on any of the subject claims prior to July 23, 1955 (Tr. 232). This conclusion was based primarily upon his examination of two aerial photographs, the first taken on March 7, 1954 (Exs. 7, 9), and the second taken on May 10, 1958 (Ex. 11) (Tr. 126-27, 500). Matthews testified that the 1954 photograph depicted no signs of development on any of the claims (Tr. 130-31), and that the 1958 photograph depicted pit development only on the Wildcat Hill No. 2 claim, with no excavations discernible on the Wildcat Hill Nos. 1, 3 or 4 claims (Tr. 131, 232, 626).

During direct examination, Matthews added that he first examined the cinders in the various workings in 1964 and concluded that they were a common

variety material (Tr. 264, 430, 450). He testified that his conclusion was buttressed after he was informed that some of the material from the claims was marketed as topsoil for groundcover (Tr. 267), and after he was informed by the Arizona Highway Department and the City of Flagstaff's engineering office that cinder material in the area did not have any special or distinct qualities (Tr. 443, 447).

With regard to the uses and marketability of cinders, the following was stated:

> Q. [H]ave you obtained any knowledge about the use of cinders in this area?
>
> A. I have endeavored to, yes.
>
> Q. What have you learned about the use of it? What uses are there?
>
> A. The uses are principally—I would say the biggest use of the cinders is for fill material. They used a tremendous amount of it on this new highway.
>
> Q. Just uses, now. Okay, highway uses. You mean for fill on the highway?
>
> A. Yes.
>
> Q. Okay. Now, what other uses?
>
> A. For surfacing, loose surfacing material on driveways and homes. There has been some use for trench drains, and coarse material that has been previously mentioned for any situation where they want to have a loosely consolidated material through which water could freely drain. In the past, they have used considerable cinders for macadam road tops. They use them for cinder block. That is quite an industry here.
>
> * * * * *

Q. All right. Can you tell us what you have learned about the marketing conditions?

A. My observations are that the marketing of cinders in this area is highly competitive. People who are fortunate enough to have their own pit, it is a matter of obtaining a user. Most of the people that I have encountered holding pits have depended on other people to do their mining and they make a minimum charge of—the rate now seems to be ten cents a cubic yard in place. Loading and hauling is the responsibility of the user.

(Tr. 561-63).

Matthews also testified that he had discussions with various persons, including Baker, concerning the market conditions as they affected the cinder deposits on the subject claims (Tr. 571-72). He pointed out that, with regard to the validity of the claims, he had considered the cost factors associated with marketing the cinders from the claims: *i.e.*, transportation, excavation, stripping, crushing, sizing, screening, etc. (Tr. 655).

On cross-examination Matthews admitted that there were some problems regarding adequate interpretation of the photographs since there was some snow coverage on the ground in the 1954 photo (Tr. 137, 138, 173); he did not know the elevation from which the photos were taken (Tr. 139, 158); there was a problem of detecting excavations below trees (Tr. 168, 297, 301); and the moisture content of the soil affected the ability to determine the existence of ex-

cavations (Tr. 174, 285). And as Judge Mesch correctly pointed out, assuming Matthews' photo interpretation was correct, the most it established was that the pit on the Wildcat Hill No. 2 claim could have been developed any time after March 7, 1954 (Tr. 131).

Thereafter, a number of witnesses were called to testify on behalf of the contestee. Georgeann Tognoni, a cartographer employed by the Mineral Economics Corporation, testified that she had examined aerial photographs of the subject claims and had made a ground examination in order to map the claims and the pits thereon (Tr. 289-297, Ex. B). Melvin McCormick testified that he had been in the mineral materials business since 1921 in the Flagstaff area (Tr. 330), and that Baker had been on the Wildcat Hill claims since 1952 (Tr. 341-42). Roberta Forehand testified that she and her husband located cinder claims on Sheep Hill, an area northeast and slightly closer to Flagstaff than appellee's claims (Tr. 349). Prior to his moving to Wildcat Hill, Baker removed cinders from Sheep Hill until the Forehands asked him to move to his own pit (Tr. 349). Mrs. Forehand testified that Baker began developing his claims by hauling "dirty cinders" off of Wildcat Hill around 1952 (Tr. 374, 376). She described "dirty cinders" which are useful in cinder block production and for road surfacing (Tr. 372).

Frank Martinez testified that he first met Baker in 1955 (Tr. 391). Martinez stated that he hauled cinders from Baker's pits from April 1955 until the

time of the hearing (Tr. 395). He described this activity as follows:

BY MR. FOWLER:

Q. What were you doing with these cinders in 1955 when you first started hauling?

A. I would sell them to people around town.

Q. Do you know what they were doing with them?

A. Well, they would use them for their front yards.

* * * * *

HEARING EXAMINER MESCH: What do you mean when you say they would use them for front yards?

THE WITNESS: Well, in front of the garage, driveways.

HEARING EXAMINER MESCH: Any place else in the yard?

THE WITNESS: Mud holes. That's about all I can say. That is what they use them for, mud holes.

BY MR. FOWLER:

* * * * *

Q. Could you tell us how much you paid for the cinders in 1955, the ones you were hauling out?

A. I wasn't paying anything for them, because he was digging and trying to get started.

Q. At what point in time did you start paying for the cinders? What year? Could you tell us that?

A. Oh, I'd say when I would get a big job that I am selling them, I pay him for what I take out.

Q. What is the first year in which you actually paid Mr. Baker for using some cinders from his pit?

A. Probably in '63.

MR. FOWLER: That's all.

REDIRECT EXAMINATION

BY MR. HACKENBRACHT:

Q. Mr. Martinez, were you helping Mr. Baker to remove overburden when he was beginning his pit?

A. Yes, sir.

Q. Is this the material then that he was not charging you for?

A. That's correct.

MR. HACKENBRACHT: No further questions, Your Honor. (Tr. 398-401).

A partial summary of Baker's testimony is set out in Judge Mesch's decision at 17:

> Mr. Baker testified (1) that prior to July 23, 1955, cinders were extracted, removed, and marketed from each of the four claims (Tr. 813, 895, 896); (2) that the claims have been continuously worked since at least 1953, and they are presently being worked (Tr. 787, 788, 835); (3) that he probably sold around 4,000 yards in 1953, 4,000 yards in 1954, and 6,000 or 7,000 yards in 1955 (Tr. 812, 813, 871); (4) that he estimates that he has produced over a million yards of cinders from the four claims since 1953

(Tr. 788, 814); (5) that he has not personally hauled and marketed cinders for a long time, but operates the pits on a royalty-type basis where he gets ten cents a yard for cinders in place, and in addition, the purchaser who provides his own equipment, pays him construction scale wages to assist in extracting and removing the cinders (Tr. 803, 815); (6) that the cinders have been used for, among other purposes, insulation in cinder blocks (Tr. 812); in the surfacing of asphalt roads (Tr. 817), to provide a porous fill that will not retain water or moisture behind concrete abutments (Tr. 817, 930), for packing around road culverts (Tr. 817), for cinder blocks (Tr. 818), in leaching fields or drains for septic tanks (Tr. 808), and for driveways, yards and mud holes (Tr. 808, 812); and (7) that in 1959, they started construction of a house on the property and they have resided there since 1960 (Tr. 850, 891).

In addition to the above, Baker testified to the following: when he began his operation on the claims he was not earning a living solely from hauling cinders but was also building roads (Tr. 762); he has concentrated his activities on the main pit on claim No. 2 (Tr. 806); between 1952 and 1955 the main pit produced "coarse cinders" used for "leach lines, and holes, stuff like that." (Tr. 807-08, 872); when he first started developing the claims he permitted persons to take material off the claims at no cost (Tr. 878); in 1952 he had two trucks, a loader, and a bulldozer, all of which belonged to his uncle (Tr. 882); eventually he bought a dump truck and

returned the other equipment to his uncle after they had a falling out (Tr. 883-84).

Donald F. Reed, a mining engineer and retired BLM mineral examiner, testified that he examined the subject claims in 1969 (Tr. 910). He concluded that the material on the claims was a common variety of cinders having no special or distinct qualities (Tr. 937-38). With regard to marketing the cinder from the claims, Reed testified that the market was highly competitive in the sense that there "is" a good market for cinders and several firms "are" engaged in producing cinders (Tr. 964-65). With regard to his opinion concerning the validity of the subject claims, Reed testified as follows:

> * * * There can be no question in anyone's mind as to the existence of the mineral, which is in this case cinders. That whole hill is cinders. So there can be no question of the discovery of cinders on any one of the claims. The value is quite evident. These cinders have been sold, and at their very minimum value, which is ten cents per yard, this constitutes a—There has been more than one million yards of cinders removed and sold from these claims. Now, that is $100,000, which is not hay. I think there is no question in anyone's mind that any man would be prudent in attempting to hold or develop these claims.
>
> * * * Considering all these factors, it is my opinion that the claims are valid and, therefore, under the law, the Bureau of Land Management, it is mandatory upon them that they approve

Mr. Baker's application for patent and issue a patent.

(Tr. 932-33).

Hale C. Tognoni was called as an expert witness on behalf of the contestee (Tr. 968). In addition to having a law practice, Mr. Tognoni is also a consulting mining engineer and geologist for the Mineral Economics Corporation (Ex. QQ). His testimony was general in nature and concerned the age and size of the various pits on the subject claims (Tr. 1001-02).

In rebuttal, the Government called on Urban Harenberg to testify (Tr. 1048). Harenberg testified that he has a block manufacturing plant which uses cinders (Tr. 1048). He was on the subject claims in 1953 and 1954 but knew little about the quantity of material removed (Tr. 1052, 1060). He stated that some of the cinders on the subject claims could be used for making cinder blocks (Tr. 1102), and that he hoped to eventually have the Harenberg No. 2 association claim validated (Tr. 1104).[7]

We now turn to an examination of the record. The Administrative Law Judge rejected the Govern-

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[7] It appears that the total supply of cinders in the general area of Flagstaff significantly exceeded the demand for the material for cinder block use prior to July 23, 1955, as Harenberg used cinders in this business from many other claims, but not the ones in issue. *See United States* v. *Harenberg*, 11 IBLA 153 (1973); *United States* v. *Harenberg*, 9 IBLA 77 (1973), and the testimony of Roberta Forehand, *supra*.

ment's arguments for the following reasons (Decision at 18-19):

> The Forest Service insists that the evidence offered by the contestee is deficient in that there is some indication "that the sales were for topsoil and fill, which uses did not make the material locatable" (Brief, p. 20), and "even if all sales are considered there is no method to determine whether there was a profitable exploitation of the cinders" (Brief, p. 26).
>
> The amount of topsoil, if any, that was removed and sold would be so minimal in comparison with the amount of cinders extracted and marketed that it is not worthy of consideration. Cinders were sold for fill purposes and if this was the sole use for the cinders from the claims, the material would not be locatable under the mining laws (*United States* v. *William M. Hinde, et al.*, A-30634, July 9, 1968). I am of the opinion, however, that the evidence offered by the contestee (and also to some extent by the Forest Service) makes it abundantly clear that a person of ordinary prudence would have been justified prior to July 23, 1955, and prior to the time of the hearing in removing and marketing the cinders from the four Wildcat Hill claims for uses recognized by the mining laws.
>
> * * * * *
>
> I conclude that the contestee has shown by a preponderance of the evidence that the four Wildcat Hill claims were perfected by valid discoveries prior to July 23, 1955, and that the claims are presently supported by valid discoveries. (Footnote omitted.)
>
> * * * * *

We find the evidence shows that Baker had been hauling and selling cinders from pits owned by others for a number of years prior to his location of his own deposit. The record also indicates that during the late 1940's and early 1950's a number of other individuals had located cinder claims in the area, opened pits, and seemingly, were attaining modest success in the profitable exploitation of their deposits. Baker, then, being acquainted with these people and what they were doing, and having considerable experience in the business and knowledge of the local market, was in a position to make a prudent decision to locate a deposit of his own rather than continue to haul and sell from the pits of others. Having determined that Wildcat Hill contained a deposit of adequate quality and vast quantity, he had sufficient basis for belief that he could develop a valuable mine (quarry) thereon. We think that the evidence is sufficient to show that he then proceeded to open three small pits, *i.e.*, Pit No. 1 on the boundary line between Wildcat Hill Nos. 2 and 3 claims, Pit No. 1-A on the Wildcat Hill No. 2 claim, and Pit No. 3-A on the Wildcat Hill No. 1 claim (Tr. 870, 871). Pit No. 1 became the focus of the bulk of his operation and extended well into the Wildcat Hill No. 3 claim.

[1] A discovery exists where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. *Castle* v. *Womble*, 19 L.D. 455, 457

(1894); *United States* v. *Coleman*, 390 U.S. 559 (1968). On the basis of this test we think that Baker was well justified in considering that he had discovered a valuable deposit of cinders on Wildcat Hill and in claiming at least a portion of that deposit under the mining law.

This test (the prudent man rule) has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. *United States* v. *Coleman, supra.* The present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of cinder claims. *United States* v. *Harenberg*, 11 IBLA 153 (1973); *United States* v. *Harenberg*, 9 IBLA 77 (1973); *United States* v. *Chapman*, A-30581 (July 16, 1968).

There is no contention that the subject claim contains an uncommon variety of cinders, and the evidence clearly shows that the cinders on the claims are used for ordinary purposes. Accordingly, we concur in Judge Mesch's finding that the cinder material on the subject claims is a common variety within the context of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). *See* the *Harenberg* cases, *supra.*

[2] The Act of July 23, 1955, removed common varieties of cinder from location under the mining

laws. Thus, it is incumbent upon one who located a claim prior to that date for a common variety of cinder to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. *Multiple Use, Inc.* v. *Morton*, 504 F.2d 448 (9th Cir. 1974); *Barrows* v. *Hickel*, 447 F.2d 80 (9th Cir. 1971); *Palmer* v. *Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968).

On the basis of these tests we have little difficulty in agreeing with Judge Mesch that Baker discovered a valuable deposit of common variety cinders prior to July 23, 1955, for which there was an existent demand, that there was adequate access to the deposit, the deposit was within reasonable proximity to the market, and that he then initiated a bona fide effort to develop a mine.

[3, 4] However, we are unable to agree with Judge Mesch that the evidence of record is sufficient to support a finding that *all four* claims were valid on July 23, 1955.

In his application for patent Baker estimates that there are 15 million tons of cinders available from these claims. Estimates of total removals from 1953 to date range from 700,000 to 1 million tons.

During the critical period prior to July 23, 1955, the evidence shows that the market for cinders was very competitive. As hereinbefore stated, numerous others in the same vicinity were already developing their own cinder pits, and the record shows that while they were succeeding to some degree, economic sur-

vival was difficult and uncertain. Roberta Forehand testified that she and her late husband opened a cinder pit at Sheep Hill on mining claims which since have been patented. In 1952 Baker was buying and hauling cinders from the Forehand pit and selling them independently in competition with the Forehands. She testified that at that time she and her husband and their children were working 7 days a week until past dark on the claims, that they had invested all of their financial resources in the project and, at the time "we were living on pennies." Under the circumstances, the Forehands considered that it was not to their advantage to allow Baker to continue to compete with them using their own cinders and improvements. They therefore terminated Baker's operation in their pit, but Mr. Forehand helped him to locate the Wildcat Hill claims on the theory that if Baker had to develop his own pit he would have to adjust his charges accordingly, to the benefit of his competitors (Tr. 366-67).

Under the circumstances we cannot agree that prior to July 23, 1955, Baker could reasonably have anticipated a need for 15 million tons of cinders, particularly when we take into account that some substantial portion of the available market was for purposes which are not cognizable under the mining law.

The testimony establishes that a very large volume of the material sold from these claims was purchased for use as fill and sub-base. In *United States* v. *Bienick*, 14 IBLA 290, 293 (1974), we reiterated the long-established rule as follows:

> Material which is suitable only for fill purposes, road base, or comparable uses is not locatable under the mining laws, and *even if the material is suitable for other purposes, its sale for the above uses cannot be considered in determining its marketability.* (Emphasis added.)

See also United States v. *Harenberg*, 11 IBLA 153 (1973); *United States* v. *Barrows*, 76 I.D. 299 (1969); *aff'd, Barrows* v. *Hickel*, 447 F.2d 80 (9th Cir. 1971); *United States* v. *Hinde*, A-30634 (July 9, 1968); *United States* v. *Brewer*, A-27908 (December 29, 1959); *United States* v. *Proctor*, A-27899 (May 4, 1959).

It follows that if sales of material for such noncognizable uses cannot be considered in determining the marketability of the material in order to establish the *value* of the deposit, it would be equally improper to consider sales for such uses for the purpose of determining *what volume* of material a prudent locator might claim in the reasonable anticipation that the demands of the market would require that amount in the foreseeable future, reasonably projected.

Judge Mesch noted in his decision that Baker sold cinder for fill, and that if this were the sole use of cinder from the claim, the material would not be locatable under the mining law. However, the Judge ventured the opinion that the evidence made it clear "that a person of ordinary prudence would have been justified in removing and marketing the cinders * * * for uses recognized by the mining laws" (Dec., 16).

This opinion was not premised upon any showing in the record of what proportion was sold for legitimate uses and what proportion was sold for fill, sub-base, grade material, and the like. Indeed, much of the material was sold to purchasers who simply hauled it away for purposes known only to them. In any event, a review of the contest record makes it quite clear that of the estimated 700,000 to 1 million tons sold and removed from the claims between 1952 and 1970, a substantial amount did go to uses which are not validating under the mining law, although the factor by which the total volume should be reduced is unknown. By the same token, the total revenue, estimated at $100,000 over the entire term, is subject to reduction by the same unknown factor.

The location of multiple claims containing deposits of mineral vastly in excess of any reasonably anticipated market need has been the topic of previous decisions. In *United States* v. *Anderson*, 74 I.D. 292 (1967), the Department held:

> Where it has been shown as to a number of mining claims located for perlite, and for which applications for patents have been filed, that the amount of the deposits on the claims is excessively large in relation to the market that exists, *only those claims can be found valid which by reason of location and volume and quality of deposits would make the most feasible mining operation and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery.* (Emphasis added.)

This Board adhered to the foregoing rule in the more recent case styled *United States* v. *Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972), which involved the location of multiple claims containing deposits of gypsite apparently in excess of any volume required as a reasonable reserve in the circumstances prevailing.

United States v. *Harenberg*, 11 IBLA 153 (1973), involved a claim for a similar deposit of cinders in the same vicinity as the cinder claims which are the subject of this appeal. In affirming the holding that Harenberg's Lava claim was null and void for want of discovery, this Board added the following observation, at page 158:

> Finally, we note that in the first *Harenberg*, *supra*, we approved for patent 40 acres of the Harenberg No. 1 claim as a reasonable reserve supply. Even were we to reach an opposite conclusion with respect to the value of the deposit on the Lava claim, we would then have to consider the issue of excess reserves. However, in light of our holding this will not be necessary.

The record in the instant case is totally devoid of any evidence which would even tend to justify Baker's location of multiple claims embracing 15 million tons of cinders prior to July 23, 1955. Neither is there any evidence that there was, or is, any likelihood whatever that the market demand, reasonably projected for years into the future, will or could absorb such a quantity from these claims for purposes recognized under the mining law.

Accordingly, we find that although Baker was justified in the reasonable and prudent anticipation that a valuable mine could be developed on this deposit, and in proceeding with the expenditure of his labor and means to that end, he located claims for far more land and mineral than reason and prudence would allow.

The largest working by far (Main Pit No. 1) is situated on the Wildcat Hill No. 2 claim and extends well into the Wildcat Hill No. 3 claim. There is abundant room on these two claims for expansion of the main pit or the opening of additional pits, which would assure a source of supply for many years. These two claims also embrace most of the other improvements of consequence, including Baker's dwelling, the water tank, truck scales, stable, and most of the road net, including the old original haul road and the new haul road presently in use (Exh. 5). Obviously, these claims "would make the most feasible mining operation." *United States* v. *Anderson, supra; United States* v. *Bunkowski, supra.*

By contrast the workings on the Wildcat Hill Nos. 1 and 4 claims, although numerous, are comparatively small and scattered and, aside from the access roads, are otherwise unimproved.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to the Wildcat Hill Nos. 2 and 3 placer mining claims and reversed as to the Wildcat Hill Nos. 1 and 4 placer mining claims, which are hereby

held to be null and void, and the case is remanded to the Bureau of Land Management for such further administrative procedures as may be necessary to implement this decision.

/s/ Edward W. Stuebing
EDWARD W. STUEBING
Administrative Judge

We concur:

/s/ Frederick Fishman
FREDERICK FISHMAN
Administrative Judge

/s/ Douglas E. Henriques
DOUGLAS E. HENRIQUES
Administrative Judge

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

[SEAL]

Feb. 8, 1976

Arizona 034727

IBLA 71-137

UNITED STATES

v.

MELTON E. BAKER

Mining Contest

ERRATUM

On January 19, 1976, this Board decided the appeal in the matter in caption. *United States* v. *Melton E. Baker*, 23 IBLA 319. In that decision a typographical error occured in the last paragraph on page 335. Wildcat Hill No. 3 placer mining claim was incorrectly identified as being declared null and void and Wildcat Hill No. 4 placer mining claim was inadvertently not mentioned. Accordingly, the last paragraph is amended to read:

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as the Wildcat Hill Nos. 2 and 3 placer mining claims and reversed as to the Wildcat Hill Nos. 1 and 4 placer mining claims, which are hereby held to be null and void, and the case is remanded to the Bureau of Land Management for such further administrative procedures as may be necessary to implement this decision.

/s/ Edward W. Stuebing
EDWARD W. STUEBING
Administrative Judge

We concur:

/s/ Frederick Fishman
FREDERICK FISHMAN
Administrative Judge

/s/ Douglas E. Henriques
DOUGLAS E. HENRIQUES
Administrative Judge

APPENDIX E

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84111

November 27, 1970

DECISION

Arizona 034727

UNITED STATES OF AMERICA, CONTESTANT

v.

MELTON E. BAKER, CONTESTEE

Involving the validity of the WILDCAT HILL Nos. 1 through 4 placer mining claims, situated within Section 9, Township 21 North, Range 8 East, G&SR Meridian, Coconino County, Arizona.

PREFACE

At the request of the Forest Service, Department of Agriculture, the Manager of the Arizona Land Office, Bureau of Land Management, Department of the Interior, issued a complaint on August 15, 1966,

challenging the validity of the subject placer mining claims. The complaint, as amended, charged that:

(a) A valid mineral discovery as required by the mining laws of the United States does not exist within the limits of the Wildcat Hill #'s 1 through 5 and Cinder placer mining claims.[1]

(b) The land embraced within the Wildcat Hill #'s 1 through 5 and Cinder placer mining claims is nonmineral in character.

(c) The Wildcat Hill #'s 1 through 5 placer mining claims have not been located in accordance with the mining laws of the United States.

(d) The cinder deposits found on these claims are "common varieties" within the meaning of 30 U.S.C. 611.

(e) These claims did not exist prior to July 23, 1955.

(f) That the E½SE¼NW¼NE¼ of Section 9, T. 21 N., R. 8 E., was closed to mineral entry between December 4, 1943, and August 30, 1960.

A five-day hearing was held commencing November 3, 1969, at Flagstaff, Arizona. The contestant was represented by Mr. Richard L. Fowler, Office of the General Counsel, United States Department of Agri-

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[1] The Wildcat Hill No. 5 and the Cinder claims are not at this time involved in the proceedings. They were dismissed at the request of the contestant.

culture, Albuquerque, New Mexico. The contestee was represented by Mr. Hale C. Tognoni and Mr. William N. Hackenbracht of the law firm of Tognoni & Pugh, Phoenix, Arizona.[2]

The issues presented for determination and the order in which they will be considered are:

1. Whether the cinder deposits found within the claims are "common varieties" within the meaning of the act of July 23, 1955, 69 Stat. 367 et seq., 30 U.S.C. 601 et seq.
2. Whether the claims were in existence on the date of the act of July 23, 1955, supra.
    a. Whether the judgment of a court in adverse proceedings initiated under Title 30 U.S.C. § 30, determining the right of possession or title to the ground as between adverse claimants, is binding on the United States in this proceeding.
    b. Whether the claims were actually located on the ground prior to the act of July 23, 1955, supra.
    c. Whether the claims are invalid by reason of a failure to timely record the location notices with the county recorder.
    d. Whether the claims ceased to exist by reason of abandonment by the contestee of his claim to the property.

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[2] During the hearing Mr. Tognoni withdrew as an attorney of record and appeared as an expert witness in behalf of the contestee.

3. Whether the claims were perfected by valid mineral discoveries prior to the act of July 23, 1955, supra.

4. Whether the claims are presently supported by valid mineral discoveries.

5. Whether a portion of the land was closed to acquisition under the mining laws prior to August 30, 1960.

    a. Whether evidence relating to the issuance of a special use permit is admissable.

    b. Whether under the circumstances the lands were effectively withdrawn from the operation of the mining laws.

Charge (b) will not be considered in this decision. If the claims are not supported by valid mineral discoveries, as alleged in charge (a), the claims would be invalid and it would serve no useful purpose to consider whether the lands are mineral or nonmineral in character. If the claims are supported by sufficient discoveries, it would necessarily follow that the lands would be mineral in character.

Charge (c) will be considered only in connection with charge (e). The Forest Service does not contend that the claims are invalid for the sole reason that they were not located in accordance with the mining laws. The Forest Service recognizes, under its theory of the case, that the claims were properly located and came into existence on February 22, 1965 (Brief, p. 7). The assertion in charge (c) is simply presented as one factor in support of the contention

that the claims did not exist prior to the act of July 23, 1955, supra.

"COMMON VARIETIES"

Section 3 of the act of July 23, 1955, 69 Stat. 368, 30 U.S.C. 611, provides in part that:

> [n]o deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws.

If the cinder deposits found within the claims are "common varieties" within the meaning of the act of July 23, 1955, supra, the claims could not be valid unless they were in existence and were perfected by valid discoveries prior to the date of the 1955 act (*United States* v. *Alfred Coleman*, A-28557, March 27, 1962, affirmed in *United States* v. *Coleman*, 390 U.S. 599 (1968); *Palmer* v. *Dredge Corporation*, 398 F.2d 791 (9th Cir., 1968), cert. denied, 393 U.S. 1066 (1969); *United States* v. *Barrows* 404 F.2d 749 (9th Cir., 1968), cert. denied, 394 U.S. 974 (1969); and *United States* v. *J. R. Osborne, et al.*, 77 I.D. 83 (1970)). If the cinder deposits are not "common varieties", the withdrawal accomplished by the 1955 act would not be operative and the claims could be valid even though they came into existence subsequent to the 1955 act if they are presently supported by valid mineral discoveries.

In order to be considered an "uncommon variety", a deposit designated in the act must meet two criteria. The deposits, in comparison with other deposits of such minerals, must have a unique property, and the unique property must give the deposit a distinct and special value. The distinct and special value may be for some use to which ordinary varieties of the mineral cannot be put, or it may be for uses to which ordinary varieties of the mineral can be or are put. However, in the latter case, the deposit must have some distinct and special value for such use which is reflected by a higher price which the material commands in the market place (*McClarty* v. *Secretary of the Interior*, 408 F.2d 907 (9th Cir., 1969); and *United States* v. *Frank and Wanita Melluzzo*, 76 I.D. 160 (1969)).

The evidence shows that the cinders from the claims have been used for fill or sub-base in highway construction; for packing around road culverts; as a mix or additive to asphalt for road surfacing; as a sub-base and a surface for private driveways; for mud holes; for drainage purposes in connection with septic tanks and leach lines; as a fill in cinder blocks for insulation purposes; and in the manufacture of cinder blocks (Tr. 371-374, 376, 399, 408, 808, 812, 817, 818, 869, 872, 1102).

An expert witness retained by the contestee testified (1) that "cinders have been used very extensively, especially in the northern part of the state" for the

same purposes as the cinders from the claims (Tr. 930); (2) that the cinders from the claims are a "common variety" of cinders; and (3) that the cinders within the claims have no "peculiar characteristics or properties which would make them more valuable than the average run of cinders" (Tr. 937-938). The conclusions of this witness were supported by other witnesses who testified as to the use of cinders in the area (Tr. 372, 373, 443, 561, 562, 566, 570).

No evidence was presented that indicates in any way that the cinders found within the claims are an "uncommon variety" except for certain testimony offered by another expert witness who also appeared in behalf of the contestee. This witness testified generally that the manufacture of cinder blocks "is a special use for cinders", and that some cinders are suitable for such a use and others are not (Tr. 1004-1006). This witness also stated that ninety percent of the houses in Phoenix, Arizona, are of a block-type construction and the major portion of the blocks were made from cinders (Tr. 1005).[3] I cannot accept the broad testimony of this witness as establishing that the cinder deposits found on the claims have, in comparison with other cinder deposits in the area, a

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[3] The position taken by this witness would appear analogous to the propostion that some sand and gravel deposits are not suitable for use as concrete aggregate and, therefore, concrete work is a special use for sand and gravel.

unique property which gives the deposits a distinct and special value.[4]

I find, on the basis of the testimony of the contestee's first expert witness and the testimony of other witnesses offered by both the contestant and the contestee that the cinder deposits found within the claims are "common varieties" within the meaning of the act of July 23, 1955, supra.

COURT JUDGMENT

Charge (e) raises the issue as to whether the claims existed prior to July 23, 1955, when Congress withdrew deposits of "common varieties" of cinders from acquisition under the mining laws. The contestee asserts that this issue cannot be considered in this proceeding because a state court has determined the issue favorably to the contestee in adverse proceedings initiated under Title 30 U.S.C. § 30, and the

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[4] This witness was the principal attorney representing the contestee prior to his withdrawal after four days of hearing in order to appear as an expert witness (Tr. 841-843). Since the testimony of this witness on this particular point was quite general, the following difficulty noted in *Jacobs* v. *Wessinger*, 211 Mich. 47, 178 N.W. 65 (1920), was not encountered:

> It is we think, to be regreted that any attorney of record in the case should find it necessary to support the contention he is bound to make with his own testimony. It is a practice not to be commended, and, while such testimony is competent, its consideration by the court is always a matter of embarrassment, because it is difficult to distinguish between the zeal of the advocate and the fairness and impartiality of a disinterested witness.

judgment of the state court is binding on the United States.[5]

Title 30 U.S.C. § 30 provides in part that:

> Where an adverse claim is filed . . . all proceedings, . . . shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction . . . . It shall be the duty of the adverse claimant . . . to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, ... After such judgment shall have been rendered, the party entitled to the possession of the claim, . . . may, . . . file a certified copy of the judgment roll, with the register of the land office, . . . whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commission of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess . . . .

The effect of a judgment in proceedings under this section as against the United States, has been considered by the courts and the Department on a number of occasions. See for example *Perego* v. *Dodge*,

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[5] In the case of *Urban M. Harenberg* v. *Melton E. Baker*, No. 22652, the Arizona Superior Court on June 2, 1967, found among other things (1) that "prior to April 8, 1954, defendant had good title to the area in question under his Wildcat Hill Nos. 1, 2, 3 and 4 unpatented mining claims", and (2) that "defendant has title to and is entitled to sole possession of the entire area in question through his Wildcat Hill Nos. 1, 2, 3 and 4 mining claims" (Ex. G).

163 U.S. 160 (1896); *Mason* v. *Washington-Butte Mining Company*, 214 Fed. 32 (9th Cir., 1914); *Bowen* v. *Chemi-Cote Perlite Corporation*, 102 Ariz. 423, 432 P.2d 435 (1967); *George H. Smith, et al.*, 10 L.D. 184 (1889); and *United States* v. *Grosso*, 53 I.D. 115 (1930). The law is summarized in *Clipper Mining Company* v. *Eli Mining & Land Company*, 194 U.S. 220 (1904), where the court stated with approval:

> In 2 Lindley on Mines, § 765, the author thus states the law:
>
> > "Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the Land Department to pass upon the sufficiency of the proofs, to ascertain the character of the land, and determine whether or not the conditions of the law have been complied with in good faith."
>
> In 4 Land Dec. 316, Mr. Justice Lamar, then Secretary of the Interior, said in respect to this question:
>
> > "Does the judgment of a court as to which of two litigants has the better title to a piece of land bind the commissioner to say, without judgment, or contrary to his judgment, that the successful litigant has complete title and is entitled to patent under the law?
> >
> > * * * * *
> >
> > ". . . the law vests in the Commissioner the authority and makes it his duty to see that the requirements of law relative to entries

> and granting of patents thereunder shall have been complied with before the issue of patent.
>
> "His judgment should, therefore, be satisfied before he is called upon to take final action in any case. In this case, the judgment of the court ended the contest between the parties, and determined the right of possession. The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. *Branagan* v. *Dulaney*, 2 Land Dec. 744. The sufficiency of that proof is a matter for the determination of the Land Department". (p. 233, 234)

The following comments of the Department in the case of *George H. Smith, et al.*, 10 L.D. 184 (1889), are particularly appropriate where, as in this case, the lands have been withdrawn from acquisition under the mining laws and a question arises as to whether a claim was located and perfected prior to the withdrawal:

> To hold that the judgment of the court is conclusive as to the right of the successful party to a patent, would be to pass upon and decide upon the rights of the government when it was not represented. The viciousness of the rule here contended for and the ease with which dishonest claimants would, under such a rule be able to perfect their claims without in good faith attempting to comply with the law, is apparent. The judgment of the court here is based upon a statement of facts agreed upon by the two claim-

> ants. The government was not a party to such agreement, and yet it is to be bound by that statement and is not to be allowed to investigate the matter to ascertain if such facts really existed or whether the agreement was the result of a collusion between these parties. While there may be no circumstances here indicating bad faith, yet it illustrates and makes apparent the fact that such ruling would open wide the door for fraud and corruption in these claims. I do not believe the legislature intended such a thing, or that this law properly construed so directs. (p. 187)

I cannot accept the contestee's argument that the Government is bound by the judgment of the state court and precluded from making its own determination as to whether the claims were located prior to and were in existence on July 23, 1955, when Congress withdrew "common varieties" of cinders from the operation of the mining laws.

LOCATION OF CLAIMS PRIOR TO JULY 23, 1955

The evidence presented by the contestant in support of the charge that the claims did not exist prior to July 23, 1955,[6] shows (1) that notices of mining locations covering the four Wildcat Hill claims were first recorded by Mr. Baker with the county recorder

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[6] The issue that the evidence was directed to and that will be considered, is whether the claims were in existence on the date of the 1955 act, and not simply whether they were in existence prior to that date.

on February 23, 1965 (Tr. 84, Ex. 3);[7] (2) that a notice of mining location covering the Harenberg No. 2 claim was recorded with the county recorder on April 8, 1954 (Tr. 85, Ex. 4);[8] (3) that in a search of the county records for the period from 1952 to 1968, no document was found indicating that Mr. Baker had filed "annual assessments of labor" (Tr. 93, 95); (4) that in the opinion of a Forest Service mining engineer, based upon a study of aerial photographs taken on March 7, 1954, no material had been extracted from the lands covered by the claims as of that date (Tr. 169, 199); (5) that Mr. Harenberg was in the area in 1953, and again in 1954, when the Harenberg No. 2 claim was located, and he did not see any claim posts of any kind (Tr. 1052-1054); (6) that at the time the Harenberg No. 2 claim was located in 1954, Mr. Harenberg saw "evidence of a little road and it looked like somebody had taken a few yards [of cinders] out" in the area covered by the claims (Tr. 1058); (7) that the first time Mr. Harenberg actually knows about that cinders were removed from the area of the claims was late in 1954 when Mr. Baker extracted several truckloads (Tr. 1060, 1063); (8) that in 1954, 1955 and

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[7] The notices recited that the 20-acre claims were located by Melton E. Baker on May 1, 1952.

[8] The notice recited that the 80-acre association placer claim, covering the same lands as the four Wildcat Hill placer claims, was located by Melton E. Baker, Urban M. Harenberg, and others, on April 8, 1954. This is the claim that formed the basis for the adverse suit arising out of the patent application filed by the contestee covering the Wildcat Hill claims.

1956, Mr. Harenberg was in the area "to see what was going on and how he [Mr. Baker] was coming along and progressing" and he knows that additional material was removed in 1955 and later years (Tr. 1061, 1064); and (9) that with few exceptions the roads that have been constructed and all work of a mining nature that has taken place in the area covered by the claims has been done by or at the direction of Mr. Baker (Tr. 1065, 1066, 1068, 1079).

The evidence presented by the contestee consisted of (1) the testimony of a witness (a) that in 1952 or 1953, he was prospecting for cinders in the area of the claims when he was informed by Mr. Baker that he was in the process of locating claims in that area (Tr. 335), and (b) that in June of 1954, Mr. Baker was hauling cinders and working the area (Tr. 336, 337, 342); (2) the testimony of another witness (a) that in 1952 or 1953, her husband took Mr. Baker to the Wildcat Hill area so that he could open his own cinder pit (Tr. 349, 350), (b) that about a week later Mr. Baker was stripping and hauling cinders from the claim area (Tr. 357), and (c) that "everybody in Flagstaff saw him" working the area after 1952 (Tr. 374, 375); (3) the testimony of another witness (a) that in 1955, sometime after April, probably May or June, he first met Mr. Baker and at that time he was working the area of the claims with a "couple of trucks and a little loader" (Tr. 391), and (b) that from sometime shortly after April 1955, until the present, he has

hauled cinders from "Baker's pit" (Tr. 391, 395, 396); (4) the testimony of another witness (a) that he went to the Wildcat Hill area in 1952 or 1953, to stake a cinder claim and found some claim markers and evidence of digging in the area (Tr. 402, 403), and (b) that Mr. Baker has hauled cinders out of the claim area since 1953 (Tr. 405); and (5) a stipulation that another individual if called as a witness would testify that in May or June of 1953, Mr. Baker was using two trucks to haul cinders from the Wildcat Hill area (Tr. 410, 411).

In addition, Mr. Baker testified (1) that he located the Wildcat Hill claims and set corner posts in 1952 or 1953 (Tr. 769-772); (2) that he did not think he had to record the claims and he did not because of a problem that arose with his uncle (Tr. 778, 779, 853);[9] (3) that the claims have been worked continuously since 1953 by himself and by other designated individuals under arrangements with him (Tr. 787, 788, 804, 835); (4) that he entered into the location of the Harenberg No. 2 claim because Mr. Harenberg "agreed with me that if I would do so, he would buy so many cinders from me a week in his [cinder block] plant . . . and that he would do all the paper work of locating and patenting the claims" (Tr. 892); (5) that Mr. Harenberg was to have a half interest in the claims "if he would do all of

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[9] The record does not show how or why this factor influenced the nonrecordation of the location notices.

that" (Tr. 892);[10] (6) that Mr. Harenberg "never would do what he said he would do . . . so I figured that they were mine" (Tr. 892); and (7) that he waited until 1965 to record the location notices on the Wildcat Hill claims "because I kept thinking that maybe I would work out a deal with Mr. Harenberg" (Tr. 892).

The Forest Service contends "that there is a serious doubt that the Contestee located four Wildcat Hill claims in 1952 or 1953"; that if the "doubt is resolved in favor of the Contestee, his alleged locations were defective under the laws of both the United States and the State of Arizona, leaving the land open to relocation by anyone not on actual notice of the locations"; that "if these defects are ignored the Contestee nevertheless abandoned whatever right he might have had when he joined" in locating the Harenberg No. 2 claim; and that "the Harenberg No. 2 claim ceased to exist on June 2, 1967 [when the judgment of the state court was rendered] leaving as existing claims on Wildcat Hill only the four claims located on February 22, 1965" (Brief, p. 6, 7).[11]

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[10] The witness who did not appear to be too versed in business affairs, did not know why Mr. Harenberg was not given an interest in the Wildcat Hill claims rather than locating the lands again with the association placer claim (Tr. 893).

[11] If the position taken by the Forest Service is supported by the law and the facts, then the land would not be subject to any claim asserted under the mining laws prior to July 23, 1955, when Congress withdrew deposits of "common varie-

On the basis of the evidence summarized above, I conclude that the contestee has established by a preponderance of the evidence that he did locate the four Wildcat Hill claims and was asserting rights in the lands under the mining laws prior to the location of the Harenberg No. 2 claim in 1954.

FAILURE TO TIMELY RECORD

The Forest Service apparently contends that the Wildcat Hill locations were defective and that the claims are invalid because the location notices were not recorded with the county recorder within 60 days after the date of location as required by the laws of the State of Arizona.

In *Clark-Montana Realty Company* v. *Butte & Superior Copper Company*, 233 Fed. 547 (D.C. Mont., 1916), affirmed, 249 U.S. 12 (1919), the court stated:

> A location and its record are different things . . . . The statutory object is to protect and reward discoveries of mines. Discovery with intent

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ties" from the operation of the mining laws. This, of course, is contrary to the undisputed fact that rights were being asserted under the mining laws prior to July 23, 1955. The Forest Service specifically recognizes that the Harenberg No. 2 claim was located on April 8, 1954, and asserts that the claim remained in existence until the judgment of the court in 1967. The state court eliminated the Harenberg No. 2 claim in favor of the Wildcat Hill claims, and if the Forest Service can now eliminate the Wildcat Hill claims in this proceeding, the lands would be freed of both conflicting claims when as an admitted fact the lands were being claimed under the mining laws.

> to claim is the principal thing and vests an estate —an immediate fixed right of present and exclusive enjoyment in the discoverer. The record is incidental machinery to secure to the discoverer his reward and to give notice to others. The spirit of all recordation acts is notice to protect others against secret equities. If the record is not necessary to create the estate (as it is in the matter of homestead exemptions and mechanics' liens), the statute providing for recording is but a direction to do certain acts and does not create conditions subsequent; and if the statute provides no forfeiture for failure to record, by failure the estate is not divested. Recordation of mining locations cannot be a condition precedent, for the estate arises before recordation is to be performed. (p. 555)

Other cases holding that the right to a mining claim is not forfeited by a failure to record a notice of location, in the absence of a state statute expressly providing for a forfeiture on that ground are *Jupiter Mining Company* v. *Bodie Consolidated Mining Company*, 11 Fed. 666 (C.C.D. Calif., 1881); *Sturdevant* v. *Vogel*, 167 Fed. 448 (9th Cir., 1909); *Dripps* v. *Allison's Mines Company*, 45 Cal. App. 95, 187 Pac. 448 (1919); and *Atherley* v. *Bullion Monarch Uranium Company*, 8 Utah 2d 362, 335 P. 2d 71 (1959). Since the Arizona statutes do not provide any penalty for a failure to record a notice of location covering a placer mining claim (A.R.S. § 27-207), I conclude that the locations covering the Wildcat Hill

claims were not defective for failure to timely record the location notices.[12]

ABANDONMENT

The Forest Service asserts that "there are no facts and no decisions which support the premise" that the contestee did not abandon whatever rights he might have had in the Wildcat Hill claims when he joined with Mr. Harenberg and others in locating the Harenberg No. 2 claim in 1954. The short answer to this assertion is (1) that the decision of the Arizona Superior Court in *Harenberg* v. *Baker, supra,* is authority for the legal proposition that under the very facts involved the relocation of the land in 1954 did not constitute an abandonment of any of the contestee's rights under the Wildcat Hill claims, and (2) that the facts as set forth above clearly establish

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[12] Even if the Arizona laws provided for a forfeiture, I doubt that the Government could invalidate a claim for failure to record the location notices. Recordation is for the protection of the miners, and if other mineral claimants do not file an adverse claim or protest in the land office, there is no logical reason for the Government to concern itself with the recordation requirements of state laws (Cf. *Robert Hawke,* 5 L.D. 131 (1886)). This conclusion would seem to necessarily follow from the fact that an applicant for a mineral patent who invokes the provisions of Title 30 U.S.C. § 38, and proves that he has held and worked the ground for the period of time prescribed by the local statutes of limitation for mining claims is not required to produce record evidence of his location, or to give any reasons for not producing such evidence (*Capital No. 5 Placer Mining Claim,* 34 L.D. 462 (1906); and Title 43 C.F.R. § 3862.3-1).

that the contestee did not intend to give up or abandon his claim to the property.[13]

The mere fact that a mining claim is relocated does not, without additional evidence, establish that the claim has been abandoned. In *Peachy* v. *Gaddis*, 14 Ariz. 214, 127 Pac. 739 (1912), the owners of certain mining claims relocated the claims under different names. The new location notices contained "the solemn declaration that the same was abandoned ground". In considering whether the complaint stated a cause of action on the ground of abandonment of the original claims, the court stated:

> . . . the complaint shows . . . that on January 1st they went upon the ground, and attempted to relocate the exact ground covered by the original locations, thus, in a most convincing way, showing a disposition not to abandon the mining ground they and their predecessors had possessed and worked from 1903. The complaint therefore fails to show an abandonment . . . (p. 741).

In *Simmons* v. *Muir*, 75 Wyo. 44, 291 P. 2d 810 (1955), the court ruled:

> If the notice of location of September 10, 1945, was in the main illegal and hence a nullity, it is difficult to see that an act which in the eyes of the law is a nullity should adversely affect a

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[13] "Where a miner gives up his claim and goes away from it without any intention of returning, and regardless of what may become of it, or who may appropriate it, an abandonment takes place . . ." *Lindley on Mines*, 3rd Ed., Vol. 2, p. 1597.

> previous and lawful act.[14] Nor can we say that the new notice of location constituted abandonment of the previous one. The question of abandonment is mainly a matter of intention . . . . The locations on September 10, 1945, claimed all the land which the locators claimed in the previous locations and hence instead of showing an intention to abandon would seem to indicate the exact contrary. All subsequent acts of the defendants show the contrary. (p. 815)

Other cases holding that a "relocation not only does not show abandonment, but negatives it" are *Hartman Gold Mining Co.* v. *Warning*, 40 Ariz. 267, 11 P. 2d 854 (1932); *Temescal Oil Mining & Development Company* v. *Salcido*, 137 Cal. 211, 69 Pac. 1010 (1902); *Berquist* v. *West Virginia-Wyoming Copper Co.* 18 Wyo. 234, 106 Pac. 673 (1910); and *Peachy* v. *Frisco Gold Mines Co.*, 204 Fed. 659 (D.C. Ariz., 1913).

The case of *Belk* v. *Meagher*, 104 U.S. 279 (1881), relied upon by the Forest Service, is not contrary to the later decisions noted above. The *Belk* case involved a relocator seeking to avail himself of minerals which another had discovered. It does not hold, either directly or by dictum, that a relocation by one alleging rights under a previous location necessarily effects a termination of those rights.

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[14] This observation is quite significant inasmuch as one of the conclusions reached by the court in *Harenberg* v. *Baker*, supra, was that the subsequent Harenberg No. 2 claim was illegal and void.

Consider, for example, the situation of a mining claimant who locates a lode claim, commences a profitable mining operation, and then, because of a serious question as to whether the deposit is properly locatable as a lode or placer, the claimant locates a placer claim covering the same land in order to fully protect his rights to the ground. Certainly no one could logically argue that by the mere fact of relocation the mining claimant abandoned his rights under the previous lode location and as a result could not assert any legitimate interest in the lands if it was later determined that the deposit that was being mined was only locatable as a lode claim.

The fact that new parties attempted to obtain possessory rights in the lands with the contestee under a location that was subsequently found to be invalid does not, at least without some additional showing, establish that the contestee abandoned his claim to the property as a result of the relocation. On the face of things, the Harenberg No. 2 location was simply intended as a convenient vehicle to give Mr. Harenberg a one-half interest in the lands with the contestee retaining an existing interest in the property.

I conclude that there are no facts and no decisions which support the premise that the contestee abandoned his rights to the ground covered by the four Wildcat Hill claims simply because he joined with Mr. Harenberg in locating the Harenberg No. 2 claim in 1954.

One further point should be noted. The Forest Service asserts generally that when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. This is correct from the standpoint that the claimant has the burden of showing that the claim has been perfected in accordance with the requirements of the mining laws (*Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir., 1959)). The proposition is not, however, correct when the issue presented does not involve any question as to whether the requirements of the mining laws have been met. If the Government asserts that a mining claim, whether otherwise valid or invalid, is no longer in existence because it has been abandoned, then the Government should bear the burden of establishing the fact of abandonment.[15] In *American Law of Mining*, Vol. 2, p. 196, the statement is made:

> It is clearly established beyond any question that the burden of proof of abandonment rests upon the party asserting the fact, and no set of circumstances has been presented to any court which has allowed a variance from this general

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[15] This proposition would seem to be irrebuttable if the charge of abandonment necessarily presupposes the prior existence of a valid claim which subsequent events have destroyed. And, a query certainly arises as to whether an invalid mining claim creates any rights in the property that can be lost by abandonment.

rule. A clear proof of intent to abandon must be made due to the court's natural abhorence of abandonment.[16]

The Forest Service has not, in my opinion, established that the contestee abandoned his claim to the property when he joined in the location of the Harenberg No. 2 claim. I conclude that the Wildcat Hill claims were in existence on July 23, 1955.

DISCOVERY

Since the cinder deposits within the claims are "common varieties" within the meaning of the act of July 23, 1955, supra, the claims must have been perfected by valid discoveries prior to the date of the 1955 act (*United States* v. *Coleman*, supra; *Palmer* v. *Dredge Corporation*, supra; *United States* v *Barrows*, supra; and *United States* v. *J. R. Osborne*, supra). In addition, the claims must be supported by proper discoveries at the present time (*Best* v. *Humboldt Placer Mining Company*, 371 U.S. 334 (1963); *Mulkern* v. *Hammitt*, 326 F.2d 846 (9th Cir., 1964); and *United States* v. *A. Speckert*, 75 I.D. 367 (1968)).

The test of discovery, both prior to July 23, 1955, and at the present time, is whether cinder deposits were found within each of the claims which could be

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[16] Not only does the party asserting abandonment have the burden of proving it, he must do so, not by the usual "preponderance of the evidence," but by proof which is "clear and convincing." See 9 *Wigmore* § 2498.2(3), n. 23; 58 C.J.S. *Mines and Minerals* § 79 (1948).

extracted, removed, and marketed at a sufficient profit to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine (*United States* v. *Coleman*, supra; *United States* v. *Frank and Wanita Melluzzo, et al.*, 76 I.D. 181 (1969)). In order to satisfy the requirements for discovery, it is not necessary to show that minerals were actually extracted, removed, and marketed from the claims either prior to July 23, 1955, or prior to the time of the hearing (*United States* v. *E. A. Barrows*, A-31023, November 28, 1969; and *United States* v. *Michael Batesal*, Director's Decision, August 6, 1969).

The evidence relating to the questions of discovery as of the two periods of time will be considered together rather than separately. This is being done because evidence of subsequent events is relevant in assessing the actions of the hypothetical person of ordinary prudence. As the Department has frequently observed, "the most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing" (*United States* v. *Calhoun*, A-31004, August 29, 1969; *United States* v. *Adam J. Flurry*, A-30887, March 5, 1968; and *Starks* v. *Mackey*, 60 I.D. 309 (1949)).

The evidence presented by the contestant consisted of the testimony of a mining engineer employed by the Forest Service and the testimony of Mr. Haren-

berg. The mining engineer testified (1) that he first visited the area of the claims in 1965 (Tr. 199, 563); (2) that from a study of aerial photographs taken on March 7, 1954, and May 10, 1958, he was of the opinion [17] (a) that there were no excavations or workings on any of the claims as of March 7, 1954, (Tr. 169, 199), and (b) that no material of any consequence had been removed from any of the claims except the Wildcat Hill No. 2 claim as of May 10, 1958 (Tr. 232, 626, 681); [18] (3) that at the present time there are at least thirteen pits, or workings, on the four claims that expose volcanic cinders (Ex. 2); (4) that in his opinion approximately 423,932 cubic yards of material had been removed from five principal pits, or workings, as of September 1968 (Tr. 1108, Ex. 18); (5) that as of September 1968, at least two of the pits were being expanded by "three of Mr. Baker's independent lessees" (Ex. 2); (6) that cinders are put to many uses in the area including cinder blocks which "is quite an industry here" (Tr. 561, 562); and (7) that most of the "people who are fortunate enough to have their own pit [19] . . . have depended on other people to do their mining and they make a minimum charge of—the rate now seems

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[17] The witness stated that he could not class himself as an expert in aerial photography (Tr. 656, 659).

[18] The witness did not know whether the work on the Wildcat Hill No. 2 claim was done between March 7, 1954, and July 23, 1955 (Tr. 131).

[19] This is certainly strong evidence that in the opinion of this witness a cinder pit in the area would be a valuable asset.

to be ten cents a cubic yard in place [and the] loading and hauling is the responsibility of the user" (Tr. 562, 563).

Mr. Harenberg, who has a block manufacturing plant that uses cinders (Tr. 1048), testified (1) that shortly after he and Mr. Baker located the Harenberg No. 2 claim in April 1954, Mr. Baker built a road into the area (Tr. 1057); (2) that later in 1954, Mr. Baker removed several truckloads of cinders from the area (Tr. 1060); (3) that additional material was removed from the area in 1955, but he does not "have any idea about the quantity" (Tr. 1061); (4) that in 1954, 1955, and 1956, he "did spend quite a little time just going up there to see what was going on and how he [Mr. Baker] was coming along and progressing" (Tr. 1064); and (5) that the cinders from the claims have many uses and in particular they are desirable for making cinder blocks (Tr. 1102).[20]

The contestee presented (1) the testimony of a witness (a) that in June of 1954, Mr. Baker was working the area with a loader and a dump truck (Tr.

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[20] The contestant did not, in my opinion, present a prima facie case in support of its allegations that the claims were not supported by valid discoveries prior to July 23, 1955, or at the present time. It would not, however, serve any useful purpose to grant the contestee's motion to dismiss the proceedings on this ground. The Forest Service could simply institute another contest and compel the contestee to endure another expensive administrative proceeding or forfeit his claims (*West* v. *Standard Oil Company*, 278 U.S. 200 (1929); and *United States* v. *Shearman*, 73 I.D. 386 (1966)).

336, 337, 342), (b) that between 1952 and 1957 or 1958, Mr. Baker wore out two trucks and a loader working the property (Tr. 342), and (c) that during this period Mr. Baker was selling material "to Harenberg and anybody else that wanted to buy it" (Tr. 342); (2) the testimony of another witness (a) that she saw Mr. Baker working the claims almost every day between 1952 and 1968 (Tr. 374, 375), and (b) that she "saw him over there when it was snowing and so cold that I don't know how that man worked out there and he was out there working that hill" (Tr. 374); (3) the testimony of another witness (a) that he started hauling cinders from "Baker's pit" sometime after April of 1955 (Tr. 395, 396), (b) that he hauled "all during the year 1955 and thereafter", and "hauled a load last Sunday" (Tr. 395, 396), (c) that he has no record of the loads he has hauled, "but I imagine it has been two or three hundred loads" with six, eight and ten-yard trucks (Tr. 398), (d) that when he first started hauling, he sold cinders to people around town who used them "in front of the garage, driveways" (Tr. 398, 399), and (e) that the first year he paid Mr. Baker for cinders was "probably in '63"—prior to that he was helping Mr. Baker remove overburden (Tr. 400, 401); and (4) the testimony of another witness (a) that Mr. Baker "has hauled cinders out of there since" July of 1953 (Tr. 405), (b) that during the last ten years, his father-in-law has purchased cinders from Mr. Baker and hauled quite a few truckloads (Tr. 407),

and (c) that the cinders were sold to people who spread them on their driveways (Tr. 408).

A mining engineer and retired mineral examiner, formerly with the Bureau of Land Management (Tr. 899, 905), testified in behalf of the contestee that:

> . . . There can be no question in anyone's mind as to the existence of the mineral, which is in this case cinders. That whole hill is cinders. So there can be no question of the discovery of cinders on any one of the claims. The value is quite evident. These cinders have been sold, and at their very minimum value, which is ten cents per yard, this constitutes a —There has been more than one million yards of cinders removed and sold from these claims.[21] Now, that is $100,000, which is not hay. I think there is no question in anyone's mind that any man would be prudent in attempting to hold or develop these claims . . . . (Tr. 932)

The other expert witness who testified for the contestee stated that the measurements shown in the patent application (Ex. D) for fourteen cinder pits on the four claims are accurate as minimum figures (Tr. 1000), and that the values, in excess of $67,000, shown in the patent application are accurate estimates of the cost of developing the cinder pits (Tr. 1034).

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[21] The witness arrived at this figure as a rough estimate based upon the size of the excavations on the claims (Tr. 959).

Mr. Baker testified (1) that prior to July 23, 1955, cinders were extracted, removed, and marketed from each of the four claims (Tr. 813, 895, 896); (2) that the claims have been continuously worked since at least 1953, and they are presently being worked (Tr. 787, 788, 835); (3) that he probably sold around 4,000 yards in 1953, 4,000 yards in 1954, and 6,000 or 7,000 yards in 1955 (Tr. 812, 813, 871); (4) that he estimates that he has produced over a million yards of cinders from the four claims since 1953 (Tr. 788, 814); (5) that he has not personally hauled and marketed cinders for a long time, but operates the pits on a royalty-type basis where he gets ten cents a yard for cinders in place, and in addition, the purchaser who provides his own equipment, pays him construction scale wages to assist in extracting and removing the cinders (Tr. 803, 815); (6) that the cinders have been used for, among other purposes, insulation in cinder blocks (Tr. 812), in the surfacing of asphalt roads (Tr. 817), to provide a porous fill that will not retain water or moisture behind concrete abutments (Tr. 817, 930), for packing around road culverts (Tr. 817), for cinder blocks (Tr. 818), in leaching fields or drains for septic tanks (Tr. 808), and for driveways, yards and mud holes (Tr. 808, 812); and (7) that in 1959, they started construction of a house on the property and they have resided there since 1960 (Tr. 850, 891).

The Forest Service insists that the evidence offered by the contestee is deficient in that there is some indi-

cation "that the sales were for topsoil and fill, which uses did not make the material locatable" (Brief p. 20), and "even if all sales are considered there is no method to determine whether there was a profitable exploitation of the cinders" (Brief, p. 26).

The amount of topsoil, if any, that was removed and sold would be so minimal in comparison with the amount of cinders extracted and marketed that it is not worthy of consideration. Cinders were sold for fill purposes and if this was the sole use for the cinders from the claims, the material would not be locatable under the mining laws (*United States* v. *William H. Hinde, et al.*, A-30634, July 9, 1968). I am of the opinion, however, that the evidence offered by the contestee (and also to some extent by the Forest Service) makes it abundantly clear that a person of ordinary prudence would have been justified prior to July 23, 1955, and prior to the time of the hearing in removing and marketing the cinders from the four Wildcat Hill claims for uses recognized by the mining laws.

It is true that there is no method to determine with exact precision the amount of profit obtained from the exploitation of the cinders within the claims. However, it seems beyond question that the mining operations on the claims were sufficiently profitable to warrant the extensive development of the claims over a period in excess of 15 years. And, certainly no method would be needed to determine the profitability of an operation based upon royalty payments that did not involve any items of expense.

In any event, I doubt that the contestee could, after some 15 years, present detailed figures as to (1) the amount of cinders used strictly for fill purposes,[22] and (2) the various costs of working the claims, and the sales price of cinders in each instance in the past in which the contestee did not operate the claims on a royalty basis. Under the circumstances and in view of the evidence that has been presented, I believe that it would be unreasonable to simply dismiss the proceedings, without any ruling on the validity of the claims, and place the parties in the positions that they occupied prior to the commencement of the time consuming and expensive administrative proceedings. I conclude that the contestee has shown by a preponderance of the evidence that the four Wildcat Hill claims were perfected by valid discoveries prior to July 23, 1955, and that the claims are presently supported by valid discoveries.

SPECIAL USE PERMIT

At the time of the hearing, a ruling on the admissibility of exhibits 14 and 14A was reserved for further consideration. Exhibit 14 consists of copies of (1) a document designated "Special Use Applica-

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[22] Even if the contestee maintained comprehensive records covering the 15-year period, could it reasonably be expected that the parties that he sold cinders to, and who subsequently sold the cinders to others, would have sufficient records covering the entire period to enable the contestee to show the exact purpose for which each ultimate purchaser used the cinders.

tion", dated December 1, 1943, and signed by an agent of the Arizona Highway Department; (2) a document entitled "Special Use Permit", dated December 21, 1943, and stamped with the name of the acting forest supervisor; and (3) a letter dated August 30, 1960, from the acting forest supervisor to the Arizona Highway Department, advising that the special use permit was being terminated. Exhibit 14A is a copy of a card showing that the case involving the special use permit was closed by the Forest Service on August 30, 1960. The lands listed in the application and permit covered, among other lands, five acres within the Wildcat Hill No. 2 claim designated as the E½ SE¼ NW¼ NE¼, Section 9, Township 21 North, Range 8 East.

The Forest Service mining engineer testified (1) that during his investigation of the claims he requested a search of certain files in the office of the Coconino National Forest (Tr. 192); (2) that as a result of the search, he saw the documents in an official file that were copied to prepare exhibit 14 (Tr. 191); and (3) that he is not the "keeper of those records" and has no knowledge of when the documents were actually prepared (Tr. 191, 192). A clerk employed in the office of the Coconino National Forest testified (1) that she is in charge of the files relating to special use permits (Tr. 718); (2) that she recently searched those files and was unable to find the documents represented in exhibit 14 (Tr. 719); (3) that she did find the card (exhibit 14A) showing that the

permit had been in existence and that the case was closed in 1960 (Tr. 1042); and (4) that she presumes the documents that were copied to prepare exhibit 14 were subsequently destroyed under the record retention program then in existence (Tr. 719, 1042).

I have considered the arguments presented by the parties at the hearing, and in post-hearing briefs. I believe that the documents in exhibit 14 and 14A are sufficiently reliable and trustworthy to warrant their receipt in evidence.

No other evidence was presented relating to the special use permit. Accordingly, I find that the five acres designated above within the Wildcat Hill No. 2 claim were included within a special use permit issued to the Arizona Highway Department for the removal of road construction materials, and that the permit was in effect at the time the claims were located and on July 23, 1955, when Congress withdrew "common varieties" of cinders from acquisition under the mining laws.[23]

In *United States* v. *Schaub*, 103 F. Supp. 873 (D.C., Alaska, 1952), affirmed, 207 F. 2d 325 (9th Cir., 1953), the Court considered the question of whether lands within a national forest had been withdrawn from entry and location under the mining laws by the issuance of a special use permit for the use of

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[23] The special use permit was presumably issued under the authority found in Title 16 U.S.C., § 497.

an area as a source of road building material. The court stated:

> . . . it does not appear that it is essential that such withdrawal be made a matter of public record even though the area withdrawn is a part of the public domain, . . . In this instance it appears that the withdrawal of February 9, 1951, [through the issuance of the special use permit] was made a matter of record in the offices of the United States Forest Service in Juneau and Ketchikan and that such records were open to inspection by the public generally. I am of the opinion that this was a valid withdrawal and that thereafter the land was no longer open to entry or location under the mining laws. (p. 875)

In *Carl M. Shearer, et al.*, A-30838, December 21, 1967, the Department ruled:

> It is well established that a material site is an appropriation of the land it covers under the laws of the United States which, while it is outstanding, bars the location of a valid mining claim. *J. M. Keeney et al.*, A-28856 (August 6, 1962); *Sam D. Rawson*, 61 I.D. 255 (1953); see *United States* v. *Schaub*, 103 F. Supp. 873 (D. Alaska 1952). Therefore the decisions appealed from property held the mining claims invalid *ab initio* as to lands included within the material site.

I conclude that the five acres within the Wildcat Hill No. 2 claim covered by the special use permit were not subject to the operation of the mining laws when

the claim was located and that the five acres must be excluded from the claim.[24]

A good deal of evidence was presented on the question of whether the contestee's original pit lies within the five-acre area covered by the special use permit. This evidence was advanced as a result of a contention made by the Forest Service that if there was in fact a discovery within the limits of this claim, it was made on withdrawn lands and therefore it would not serve to validate the claim. This argument is an extension of what appears to be one of the basic propositions advanced by the Forest Service; namely, that in order to have a valid discovery there must have been development work prior to July 23, 1955. As noted previously, it is not necessary to satisfy the requirements for discovery to show that minerals have actually been extracted, removed and marketed. Inasmuch as the entire Wildcat Hill area is cinders (and no question has been raised concerning a physical finding of cinders), and since the cinders in the area of the claims could have been and actually were extracted, removed and marketed at a profit prior to July 23, 1955, I see no reason to make any finding as to whether the original pit was within the five-acre withdrawn area. Even if all of the work done prior to July 23, 1955, was in the withdrawn

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[24] The five acres were not subject to acquisition under the mining laws prior to the termination of the special use permit in 1960, and after that only upon a proper discovery of a valuable mineral deposit other than a "common variety" deposit designated in the act of July 23, 1955, supra.

area, I could not under the law and the facts conclude that a valid discovery was not made on the Wildcat Hill No. 2 claim or on the other three Wildcat Hill claims.

ORDER

The complaint is dismissed except as to charge (f). If the patent application is otherwise proper, a patent should issue for the Wildcat Hill Nos. 1 through 4 placer mining claims, excluding however the E½ SE¼ NW¼ NE¼ of Section 9, Township 21 North, Range 8 East, G&SR Meridian, Coconino County, Arizona.

/s/ Robert W. Mesch
ROBERT W. MESCH
Hearing Examiner

APPEAL INFORMATION

The right of appeal to the Board of Land Appeals, Office of the Secretary, is allowed in accordance with the regulations in 43 CFR Part 1840. However, if an appeal is to be taken, the notice of appeal must be filed in this office (not with the Board) so that the case file can be transmitted to the Board. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations.

See page 22 for distribution

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